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No. 82-776

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE PENNSYLVANIA STATE UNIVERSITY, BOARD OF TRUSTEES OF THE PENNSYLVANIA STATE UNIVERSITY, JOHN W. OSWALD and M. LEE UPCRAFT,
Petitioners,

v.

AMERICAN FUTURE SYSTEMS, INC., STEVEN BRUBAKER, RICHARD J. WINGERT, W. BRUCE DEL VALLE, JOAN D. VARSICS, DENNIS C. HABACHER, JOHN P. SPILLER, and KEVIN GRAVES,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether a state university may control the use of its property by imposing regulations on the manner and content of commercial speech which prohibit a commercial vendor from the direct solicitation and sale of merchandise to groups of students in university owned dormitories, where the purpose of the regulation is to serve the university's interest in maintaining a proper study atmosphere in the dormitories and in protecting the privacy of students?

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OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The opinion of the District Court for the Middle District of Pennsylvania, reported at 522 F.Supp. 544 (M.D. Pa. 1981), also appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on August 9, 1982. A timely petition for rehearing en banc was denied by an equally divided Court of Appeals (five Circuit Judges voting in favor and five Circuit Judges voting against rehearing en banc) on September 21, 1982. The opinions of the Court of Appeals in favor of and against rehearing en banc appear in the Appendix hereto. This petition for certiorari was filed within ninety (90) days of September 21, 1982. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment.

> Congress shall make no law . . . abridging the freedom of speech . . .

Fourteenth Amendment, Section 1.

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . .

STATEMENT OF THE CASE

Petitioner, The Pennsylvania State University (Penn State) is a large, multi-campus, university which offers a broad range of undergraduate and graduate educational programs for the citizens of the Commonwealth of Pennsylvania. At its main campus in State College, Pennsylvania, it owns and operates 68 residence halls for over 13,000 students. For the most part, the residence halls are like any typical college dormitory; the students share rooms and communal facilities located along common hallways. Study lounges and other common areas are also provided in the residence halls.

Penn State policy generally prohibits commercial activity on its campuses. Historically, it has maintained its residence halls exclusively for the private use of its students and their guests. The public has never had access to residence halls.

In order to accommodate the personal commercial needs of student residents, a student is permitted to invite a commercial vendor to that student's room to conduct a commercial transaction with that student only. However, group solicitation and sales of merchandise or services is prohibited. Students are permitted to conduct other kinds of group activities in residence halls, such as educational or social functions in the common areas, including demonstrations by vendors of merchandise, so long as there is no group solicitation or sales. Following such a demonstration, a student is free to invite the vendor to the student's room to conclude a sale.

The Respondent, American Future Systems, Inc. (AFS) is engaged in the sale of cookware, crystal and tableware to college students throughout the United States. The particular sales method of AFS is to induce a student hostess to invite other students to a group demonstration of merchandise by a sales agent of AFS. At the conclusion of the demonstration, the students are asked to sign consumer finance contracts involving the purchase of hundreds of dollars of merchandise.

In the fall of 1977, AFS attempted to conduct at least 51 sales demonstrations in various locations in residence halls of Penn State by sending its sales agents door to door to secure hostesses. Penn State prohibited these demonstrations, but did inform AFS that it could conduct demonstrations in the common areas of the residence halls if no attempt was made to solicit sales. AFS refused the invitation, stating that "there would be no point in that."

AFS brought suit against Penn State in the District Court for the Middle District of Pennsylvania seeking to enjoin enforcement of the policy on the ground that it violated AFS's commercial speech rights under the First Amendment. In *American Future Systems, Inc. v. Pa. State University,* 464 F.Supp. 1252 (M.D. Pa. 1979), the Court held that Penn State's policy was constitutional because (1) AFS had ample alternative means to communicate its message to students and (2) Penn State's interests in protecting the privacy of its students and in preventing a company engaged in questionable business practices from operating on its property were sufficient to constitutionally validate the policy. AFS appealed to the Circuit Court of Appeals for the Third Circuit which affirmed the judgment below in *American Future Systems v. Pa. State University,* 618 F.2d 252 (3rd. Cir. 1980) (hereinafter referred to as "AFS I"). In AFS I the Third Circuit held that Penn State had articulated legitimate state interests in maintaining a proper study atmosphere in residence halls and in preserving the privacy of students, and that, since its policy furthered these interests, it was constitutional. The opinion of the District Court and of the Circuit Court in AFS I also appear in the Appendix hereto.

Following AFS I, AFS requested permission to conduct group demonstrations of its products in the common areas of the residence halls. Penn State informed AFS that it could conduct group demonstrations in the common areas, but that it could not solicit sales by informing the students of the prices and terms and conditions of sale unless invited by a student to the room of that student to conduct an individual transaction. AFS again refused to conform to the policy and brought another suit in the District Court, alleging violations of its right to First Amendment protection of commercial speech. Several students joined in the suit as plaintiffs, alleging that the policy violated their First Amendment rights. The District Court granted Penn State's motion for summary judgment

against all plaintiffs in *American Future Systems v. Pennsylvania, Etc.*, 522 F.Supp. 544 (M.D. Pa. 1981). The District Court held, inter alia, (1) that the claim of AFS that the policy was unconstitutional was barred by the res judicata effect of AFS I, (2) that the disclosure of price and other terms and conditions of sale was commercial solicitation which violated the policy and (3) that the policy did not violate any First Amendment right of students to hear commercial speech, because such right is the corollary of the right to speak, which was not violated by the policy.

On appeal, the Circuit Court panel reversed the summary judgment in favor of Penn State and remanded the action to the District Court for proceedings consistent with its opinion and judgment. Penn State's petition for rehearing en banc was denied by an equally divided Circuit Court. This petition for writ of certiorari followed.

In its opinion (AFS II), the panel analyzed the effect of AFS I and decided that AFS I upheld the constitutionality of the policy only insofar as it prohibited the consummation of sales in a group setting. It was the panel's view that, consequently, the claim of AFS of the right to conduct sales demonstrations without restriction on the content of the speech was not barred by res judicata. The panel then reasoned that the policy's prohibition on group solicitation, i.e. disclosure of price and other terms and conditions of sale was content-based "censorship" of commercial speech, that to pass constitutional muster Penn State had to show that the policy furthered its interests in maintaining a proper study atmosphere and preserving the privacy of students, and that Penn State had failed to make such a showing. In the words of the panel, Penn State failed to even make a "plausible explanation" because "Restrictions on the *contents* of the demonstration as distinguished from the conduct of the demonstration cannot further these interests." Slip Op. at 11 (3rd Cir., August 9, 1982); emphasis in original.

The panel also reversed the summary judgment in favor of Penn State with regard to the students' claim of a First Amendment right to participate in group commercial demonstrations in the student's room. This part of the claim was also remanded to the District Court for a determination whether such a restriction furthered substantial state interests.

Penn State's petition for a rehearing en banc was denied by an equally divided Court of Appeals. In dissenting from the denial, Judge Adams reviewed the principal decisions of the Supreme Court which established and delineated the limited scope of First Amendment protection for commercial speech. He then stated:

> "I have a serious question whether a reasonable reading of *Bigelow*, *Virginia Pharmacy*, *Bates*, and *Ohralik* can yield a conclusion that a state university is constitutionally limited to a narrow range of options in regulating third parties permitted on school premises to promote sales of merchandise. I believe this matter should be addressed by the entire Court and the subject carefully considered before signals are sent to state universities indicating that they may well lose a significant portion of their control over commercial activity on their campuses.
>
> I am concerned that, unless the courts are prepared to step back and take a careful review of the precedents, the extension of a juridical concept by a dry and remorseless logic can carry us to a position never contemplated by the Supreme Court when this doctrine was first propounded. Moreover, it is a position totally incompatible with our societal concerns.[1]
>
> * * *
>
> [1]As the Chief Justice has reminded us: ' "All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular

> right is founded. . ." ' *United States v. 12 200-Ft Reels of Super 8 Mm. Film*, 413 U.S. 123 (1973), quoting *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355 (1908) (Holmes, J.)."

American Future Systems v. Pennsylvania State University, Sur Petition for Rehearing, September 21, 1982, Opinion of Adams, J., Slip Op. p. 7.

The jurisdiction of the Court of Appeals for the Third Circuit was pursuant to 28 U.S.C. § 1291. Jurisdiction of the United States District Court for the Middle District of Pennsylvania was predicated on 28 U.S.C. § 1331 and § 1343.

REASONS FOR GRANTING THE WRIT

The opinion of the Third Circuit is in conflict with the applicable decisions of this Court on an important issue of constitutional law. Because the Third Circuit has extended the scope of First Amendment protection of commercial speech far beyond any boundary suggested by this Court, consideration of the issue is necessary at this time to provide guidance to state universities throughout the United States. Failure to deal with this issue now will, in the words of Judge Adams, send a signal "to state universities indicating that they may well lose a significant portion of their control over commercial activity on their campuses." *American Future Systems, Inc. v. The Pennsylvania State University*, Sur Petition for Rehearing, Slip Op. at 7 (3rd Cir., September 21, 1982). This may cause the unnecessary development of a backlog of cases which will ultimately have to be dealt with by the federal courts.

Generally, the commercial speech cases before this Court have dealt with total prohibitions on certain kinds of commercial speech. *Bigelow v. Virginia*, 421 U.S. 809 (1975) (state law banning all publications encouraging abortion held to be unconstitutional); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425

U.S. 748 (1976) (state law banning pharmacists from all advertising of the sale of prescription drugs held to be unconstitutional); *Bates v. State Bar,* 433 U.S. 350 (1977) (state rule which prohibited any advertising by a lawyer held to be unconstitutional); *Ohralik v. Ohio State Bar Association,* 436 U.S. 447 (1978) (state rule banning lawyer from in-person solicitation of clients held to be constitutional); *Central Hudson Gas and Electric Corp. v. Public Service Commission of New York,* 447 U.S. 557 (1980) (state rule banning all advertising by electric utility held to be unconstitutional, but a ban on advertising designed to increase electrical consumption would serve state interest in energy conservation, and consequently, would be constitutional).

These decisions do not suggest that a state university may not impose time, place and manner restrictions on the commercial use of its property. Nor do they suggest that in determining the manner in which a vendor will use its property, a state university may not impose restrictions on the content of commercial speech which are designed to discourage and minimize that commercial use. As this Court has stated, "[t]he state, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Adderly v. Florida,* 385 U.S. 39 at 47 (1966). This court has also recognized the validity of time, place and manner regulations on the content of speech where the basis of the regulation is not hostility to the ideas or facts stated, but rather is intended to preserve property for the purposes to which it is dedicated. *Consolidated Edison Co. v. Public Service Com'n,* 447 U.S. 530 (1980).

The Third Circuit panel recognized that the vendor here may solicit sales of its merchandise directly to an individual student who invites the vendor to that student's dormitory room. Where a vendor has ample alternative means of communication, as in this case, a restriction on

group solicitation of sales should not be of constitutional dimension. The federal courts should not be regulating the specific manner in which a state university permits outsiders to use its residence halls, particularly where, as in this case, there has been a careful effort to balance the personal commercial needs of students with the need to ensure a proper study atmosphere and personal privacy.

In any event, it is apparent on the face of the matter that Penn State's policy meets the test of *Central Hudson,* which is whether "the regulation directly advances the governmental interest asserted and whether it is not more extensive than is necessary to serve that interest." 447 U.S. at 566.

The policy, like the proscription in *Ohralik, supra,* is a prophylactic measure designed to reduce and minimize the level of commercial activity which *might* intrude upon the interests advanced by Penn State, rather than a measure designed to control specific conduct or speech while it is occurring in the residence hall. The policy is designed to and does in fact discourage group commercial activity, including both the proposal and consummation of group sales transactions, in the residence halls, while not totally banning commercial transactions because of the need to balance the personal commercial needs of students with the needs for a proper study atmosphere and personal privacy. There can be no better proof that the policy serves Penn State's articulated interests than the fact that AFS refused to conduct its sales activities under the policy. This reduced the level of commercial activity in the residence halls substantially, inasmuch as AFS proposes to conduct large numbers of so-called demonstrations. Thus, the interests of study and privacy were served on a prophylactic basis.

Penn State may, under *Ohralik, supra,* and *Central Hudson, supra,* impose such a limitation upon commercial

speech in the residence halls. In *Ohralik,* the Supreme Court recognized that the state may impose limitations on commercial speech which are "prophylactic measures whose objective is the prevention of harm before it occurs." 436 U.S. at 464. In *Central Hudson,* the Supreme Court also recognized that the state may impose restrictions on commercial speech in order to discourage commercial transactions, reducing the level of commercial activity in order to serve a state interest. There, the state had banned all advertising by a utility. The court held the total ban to be unconstitutional, but recognized that a more narrowly drawn regulation could be valid. The court stated:

> "In contrast, the state's interest in energy conservation is directly advanced by the Commission order at issue here. There is an immediate connection between advertising and demand for electricity. Central Hudson would not contest the advertising ban unless it believed that promotion would increase its sales. Thus, we find a direct link between the state interest in conservation and the Commission's order." 447 U.S. at 569.

Like *Central Hudson,* there is a "direct link" between Penn State's policy and the interests of study and privacy. It is obvious that there is an "immediate connection" between group solicitation and sales and the level of demand, i.e., commercial activity, in the residence halls. Thus, Penn State's articulated interests are directly served.

Nor is there a requirement that Penn State demonstrate that the specific conduct of this vendor – AFS – will violate the interests the policy protects. In both *Ohralik* and *Heffron v. Intern. Soc. For Krishna Consciousness,* 452 U.S. 640 (1981), the Supreme Court stated that specific evidence of harm was not required to uphold a policy restricting speech related activities. In *Ohralik,* the lawyer's speech did not cause the harm the policy sought to

avoid. In *Heffron,* the impact of the plaintiff's solicitations would have been minimal on the state interest of crowd control. Yet, in both cases, the restrictions were upheld because the Court focused on the *potential* for harm to the state interests in the absence of the policy. By requiring specific evidence of harm from the AFS sales solicitation, and ignoring the potential for harm if AFS and all commercial businesses may solicit sales, the panel decision is contrary to *Ohralik* and *Heffron.*

Thus, the panel of the Third Circuit has made a radical extension of the First Amendment protection of commercial speech which calls for further review at this time. Although there has been a remand to the District Court for further proceedings, the importance of the issue and the intracircuit conflict qualify this case for review despite its interlocutory status. See, *Land v. Dollar,* 330 U.S. 731, 734, n.2 (1946); *Larson v. Domestic & Foreign Commerce Corp.,* 337 U.S. 682, 685, n.3 (1947); *Dickinson v. Petroleum Conversion Corp.,* 338 U.S. 507, 508 (1950).

At the very least, the petition should be granted for the purpose of remanding the action to the Third Circuit for en banc review. See, e.g., *United States ex rel. Robinson v. Johnston,* 316 U.S. 649 (1942).

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

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November 1982

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

AMERICAN FUTURE SYSTEMS, INC., et al.,	:	
Plaintiffs	:	Civil No. 81-0171
vs.	:	Complaint Filed
	:	2/5/81
THE PENNSYLVANIA STATE UNIVERSITY, et al.,	:	(Judge Muir)
Defendants	:	

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UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

AMERICAN FUTURE SYSTEMS, INC., et al.,	:	
Plaintiffs	:	Civil No. 81-0171
vs.	:	Complaint Filed
	:	2/5/81
THE PENNSYLVANIA STATE UNIVERSITY, et al.,	:	(Judge Muir)
Defendants	:	

OPINION

MUIR, District Judge.

Plantiffs filed this action alleging violations of their constitutional rights and of rights granted by Pennsylvania law on February 5, 1981. Jurisdiction is alleged to arise under 28 U.S.C. §§ 1331 and 1343 and the doctrine of pendent jurisdiction. Also on February 5, 1981, Plaintiffs filed a motion for a preliminary injunction which was denied by this Court in American Future Systems vs. Pennsylvania State University, 510 F.Supp. 983 (M.D. Pa. 1981). On July 17, 1981, Defendants filed a motion for summary judgment and supporting brief. On August 24, 1981, Plaintiffs responded, and on August 31, 1981, Defendants filed a reply. For the reasons set forth below, Defendants' motion for summary judgment will be granted.

This case is the second one before the Court involving policies of Pennsylvania State University (Penn State) relating to commercial activities in its dormitories. In the first lawsuit, judgment was granted in favor of Penn State upholding its regulations against an attack that they

violated American Future Systems' (AFS) First Amendment rights American Future Systems, Inc. vs. Pennsylvania State University, 464 F.Supp. 1252 (M.D. Pa. 1979), *aff'd* 618 F.2d 252 (3d Cir. 1980) (*"American Future Systems I"*).

AFS is a corporation whose principal business is the sale of cookware, china, crystal, and silverware through demonstrations of its merchandise at colleges throughout the United States. AFS seeks by this action to be permitted to present sales demonstrations at the invitation of individual students in the common areas and dormitory rooms within the residence halls of Penn State, to disseminate commercial information to groups of students through sales demonstrations at the invitation of individual host students in their individual dormitory rooms, and to consummate sales to individual students in the student hosts' rooms and residence halls of Penn State. Plaintiffs Wingert and Brubaker are Penn State students who formerly resided in Penn State residence halls. Wingert withdrew as a student at Penn State in February 1981 and is no longer enrolled. Brubaker, while still enrolled as a student, no longer resides in a Penn State residence hall. Wingert and Brubaker seek relief permitting them to invite AFS to common areas and their individual dormitory rooms and residence halls, to conduct in their rooms and in common areas of residence halls, sales demonstrations to groups of invited students and to invite AFS to their dormitory rooms for purposes of consummating sales of goods to other students following the demonstrations. Plaintiffs DelValle, Varsics, Habacher and Spiller are current Penn State students who do not reside in residence halls. DelValle, Varsics, Habacher and Spiller seek an order permitting them to attend and participate in AFS group demonstrations in common areas

and dormitory rooms and to consummate sales from AFS in those rooms.

As this Court already held in its denial of Plaintiffs' motion for a preliminary injunction, the policy of Penn State during the time that *American Future Systems I* was litigated and now is that (1) AFS may conduct group demonstrations in specified common areas of each residence hall; (2) following those demonstrations a student may invite an AFS representative to the student's room to purchase AFS goods; (3) AFS is free to solicit invitations to individual students' rooms at the group demonstrations or by telephone or mail; (4) AFS is not permitted to conduct group demonstrations in an individual dormitory room; (5) AFS is not permitted to consummate sales in dormitory rooms to a purchaser other than the occupant of the room; (6) AFS is not permitted to conduct group solicitations of sales in the common areas of residence halls; (7) AFS is not permitted to consummate commercial transactions in the common areas of residence halls. American Future Systems vs. Pennsylvania State University, 510 F.Supp. 983, 985 (M.D. Pa. 1981). It is Plaintiffs' position that under the ruling of the Court of Appeals in *American Future Systems I* they are entitled to the relief sought in this action. Defendants are of the view that their policies relating to commercial activities in Penn State's dormitories are consistent with the Court of Appeals' opinion in *American Future Systems I*, and that Plaintiffs are not entitled to relief.

Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions in the record, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Rule 56(c) of the Federal Rules of Civil Procedure.

Because the bases for granting summary judgment are somewhat different as to Plaintiff AFS, to Plaintiffs Wingert and Brubaker, and to Plaintiffs DelValle, Varsics, Habacher and Spiller, AFS and each group of individual Plaintiffs will be discussed separately.

I. AFS.

AFS's primary contention is that the decision of the Court of Appeals in *American Future Systems I* granted AFS certain rights that Penn State has abridged. To the contrary, the Court of Appeals' opinion contains no declaration of AFS's rights, and in that opinion the Court concluded that Penn State's policies governing commercial activity was wholly consistent with AFS's First and Fourteenth amendment rights. The Court of Appeals recognized that a total suppression of AFS's commercial speech would probably violate AFS's constitutional rights. *American Future Systems I*, 618 F.2d at 258. In holding that Penn State's distinction between non-commercial and commercial speech was valid, the Court of Appeals noted that Penn State had only restricted, rather than suppressed, speech. "[AFS] sales representatives are allowed into the residence halls to present demonstrations to groups of students, [but] they cannot consummate sales at these gatherings. Even that restriction is removed if the sales representative is invited to the hall by an individual student who decides to purchase the merchandise marketed by AFS." 618 F.2d at 258. There is a dispute as to whether the Court of Appeals' decision in *American Future Systems I* actually vests in AFS the *right* to set up group demonstrations of its products in the Penn State residence halls. However, inasmuch as Penn State policies permit such group demonstrations, this Court need not reach that question. The issues now before the Court are (1) whether

Penn State may limit AFS to presentations in common areas, as opposed to private rooms, and may limit AFS's actual solicitation to private rooms and not permit such solicitation in common areas; and (2) whether AFS's proposed presentation does in fact constitute solicitation, in whole or in part.

Penn State's policy governing commercial activity in its residence halls has remained unchanged since AFS made its initial attempts to conduct demonstrations of its products in 1977. Specifically, in effect at the time of the *American Fut[illegible] Systems I* litigation was Penn State's policy that AFS could present demonstrations, but not solicitations of sales in the common areas of residence halls, and that AFS is free to consummate commercial transactions (i.e. solicitation) in student's rooms, but not in common areas. *See American Future Systems I*, 464 F.Supp. 1252, 1258 (¶ 59); American Future Systems vs. Pennsylvania State University, 510 F.Supp. 983, 985 (M.D. Pa. 1981). The record shows that AFS was aware of this policy at the time that it filed the *American Future Systems I* action. *See American Future Systems I*, 464 F.Supp. at 1258 (¶ 59). AFS's attempt to relitigate the constitutionality of Penn State's policies regarding commercial activities in dormitories is barred by the doctrine of res judicata.

The doctrine provides that a party who has suffered an adverse judgment may not, in subsequent litigation against the same party, seek to relitigate any issue that was or *could have been* determined in the first action. *See* Montana vs. United States, 440 U.S. 147, 153-54 (1979). The purpose of this doctrine is to ensure finality in the adjudication of disputes and to provide a conclusive resolution not only of matters that were actually considered but also of all of those which could have been considered.

Cramer vs. General Telephone & Electronics Corp., 582 F.2d 259, 266 (3d Cir. 1978), *cert. denied,* 439 U.S. 1129 (1979).

In order for res judicata to apply, three elements must be present: (1) there must be an identity of parties; (2) there must be in existence a valid, final judgment on the merits by a Court of competent jurisdiction; and (3) the second action must concern the same subject matter or cause of action as the prior suit. Sworob vs. Harris, 451 F.Supp. 96, 99-100 (E.D. Pa.) *aff'd* 578 F.2d 1376 (3d Cir. 1978) (memorandum). There can be no dispute as to the first two requirements. Here, AFS and the same Penn State defendants have been involved in both actions. Further, there is a final, valid judgment upholding Penn State's policy governing commercial activities in dormitories. As to the third requirement, the second action may be said to involve the same cause of action if liability is sought to be imposed on a different theory but based on the same "liability creating conduct" of the Defendant which gave rise to the first action. Coggins vs. Carpenter, 463 F.Supp. 270, 280 (E.D. Pa. 1979), *citing* Williamson vs. Columbia Gas & Electric Corp., 186 F.2d 464 (3d Cir. 1950), *cert. denied,* 341 U.S. 921 (1951). Based on the allegations of Plaintiffs' complaint, the exhibits attached thereto, and affidavits submitted in this matter, the Court concludes that AFS is complaining about the same conduct of which it complained in *American Future Systems I,* namely Penn State's regulations limiting access by AFS to the university's dormitories. The Court also concludes that AFS had in that action opportunity to present to the Court and to the Court of Appeals any claims it might have had as to the precise contours of the permissible scope of group demonstrations as well as any other matters relating to any other constitutional rights that may have been adversely affected by Penn State's policies. Since the

Court of Appeals has already upheld the validity of Penn State's policies with respect to commercial activities within residence halls, and since AFS had a full and fair opportunity to litigate the validity of that policy, or any aspect thereof, in the first action, res judicata operates to preclude AFS's challenge to that policy in this action. Therefore, summary judgment will be granted in favor of the Plaintiffs as to AFS's claim that Penn State's policy with respect to commercial solicitation and activity in the dormitories violates AFS's First and Fourteenth Amendment rights.

AFS's second claim is that Penn State's position that it may censor the substance of AFS's demonstrations violates AFS's constitutional rights. Penn State contends that certain portions of the AFS demonstration involve the solicitation of sales rather than educational or informational material within the normal meaning of "demonstration." Penn State claims that these provisions which involve price, credit and guarantee terms, are properly considered commercial rather than educational in nature, and are therefore properly restricted to individual solicitation in private rooms and may be excluded from the demonstrations in common areas. (Defendants' Brief in Support of Motion for Summary Judgment at pp. 11-12.) AFS, in response, claims that if it were to present its demonstrations in the manner required by the University, it might appear to its listeners to be engaging in sharp business practices. AFS claims that if it is allowed to demonstrate and display its products, but is not allowed to give information regarding prices, guarantees, exchange policies and specially designed credit terms to fit students' budgets, its sales representatives' credibility as legitimate and honest people would be undermined. (Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment at pp. 8-9).

The Court of Appeals' decision in *American Future Systems I* specifically upheld Penn State's regulations to the extent that they rested upon a distinction between commercial and non-commercial speech. Addressing the question of solicitation and consummation of sales in common areas, the Court of Appeals first noted that Penn State had advanced reasonable objectives to support its ban on group commercial activity in its residence halls. Finding that Penn State had not acted in an arbitrary, capricious, or invidious manner in distinguishing between commercial and non-commercial speech (i.e. solicitations as opposed to demonstrations), the Court concluded that Penn State's policies do not violate the First Amendment. *American Future Systems I,* 618 F.2d at 259. Thus, AFS's position that the Court of Appeals did not anticipate or recognize distinctions between educational programs and commercial solicitation (Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment at p. 8) is clearly erroneous.

In *American Future Systems I,* this Court and the Court of Appeals were not faced with the question of whether particular aspects of AFS's presentations were educational or commercial. Thus, this aspect of AFS's claim is not barred by res judicata.

AFS's proposed presentation is evidenced by the cue cards that are attached to the complaint. The parties have agreed in their statement of material facts that the cue cards in Exhibit E of the complaint constitute substantially all of AFS's presentation. Cards 1 through 23 are clearly educational and instructional in nature, and it is permissible to convey this information at AFS's group demonstrations. Cards 24 through 31 relate to guarantee and payment plans offered to the students. These cards constitute solicitation of sales, and Penn State may constitutionally

prohibit AFS from presenting this information as a part of its demonstrations. The material contained in cards 32 through 36 is informational and permissible. The material in the first paragraph of card 37 deals with the price of AFS's goods, and constitutes impermissible solicitation. The material contained in the remainder of card 37 and cards 38 through 51 is instructional and permissible. The material contained in cards 52 through 65, as well as those portions of cards 66 and 67 that involve distribution of contracts for purchase of AFS goods, involves impermissible solicitation.

The only portions of AFS's demonstration that are at issue in this segment of the lawsuit are those which the Court has found to be impermissible pursuant to the Court of Appeals's ruling in *American Future Systems I.* Since there is no issue as to any material facts, summary judgment is appropriate. The Court will therefore enter summary judgment in favor of Defendants as to this issue.

II. **Plaintiffs Brubaker and Wingert.**

Defendants first assert that the claims of Brubaker and Wingert are moot because Wingert has withdrawn from the university and Brubaker has not renewed his contract for a university dormitory room during the upcoming academic year. Plaintiffs, in an apparent attempt to solve the "mootness" problem, on August 31, 1981, filed a motion to join an additional Plaintiff. The proposed Plaintiff, Kevin Graves, is a present Penn State student who resides in a Penn State residence hall and who has notified Penn State of his intention to hold an AFS demonstration in his dormitory room on September 14, 1981. (Affidavit of Kevin Graves at pp. 1-2). Graves has not, to the Court's

knowledge, been denied permission to hold the AFS demonstration in his dormitory room. (Memorandum of Law in Support of Plaintiffs' Motion to Join Kevin Graves as an Additional Plaintiff at p. 2.) Since Graves has not yet been denied permission to hold the AFS demonstration, the Court doubts whether his dispute with Penn State is sufficiently ripe for the Court to adjudicate his claim. However, the Court will not dismiss Brubaker's and Wingert's claims on mootness grounds. Graves's claims will not materially alter the facts of this dispute and the Court will today dismiss the entire lawsuit. Therefore, the Court will consider the facts in the light most favorable to Graves and will grant Plaintiffs' motion that Graves be added as an additional Plaintiff. Graves's claims will be treated as identical to those of Brubaker and Wingert.

The definition of mootness is well settled: A case is moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome of the lawsuit. Powell vs. McCormack, 395 U.S. 486, 496 (1969). Despite this definition, a claim is not moot even though the alleged violation is not presently in force or continuing, where the alleged violation or challenged conduct is capable of repetition, yet evading review. Southern Pacific Terminal Co. vs. ICC, 219 U.S. 498 (1911); Winsett vs. McGinnis, 617 F.2d 996, 1003 (3d Cir. 1980); *cert. denied, sub nom.*, Anderson vs. Winsett, ____ U.S. ____ 101 S.Ct. 891 (1981). Where individual Plaintiffs are suing, and there is no class action, the capable of repetition, yet evading review doctrine is limited to the situation where (1) a challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subject to the same action again. Weinstein vs. Bradford, 423 U.S. 147, 148-49 (1975), *citing* Sosna vs. Iowa, 419 US. 393 (1975). As defendants

point out in their reply brief, the "capable of repetition yet evading review" doctrine is inapplicable if there is no reasonable expectation that the *same* Plaintiffs will be subject to the *same* policies again. (Defendants' Reply Brief at p. 5).

In order for the Court to grant summary judgment in favor of Defendants as to Plaintiffs Brubaker's and Wingert's claims, there must be no material issue of fact in dispute. As to Brubaker, Defendants claim there is no possibility that he will again be subject to Penn State's policies because Brubaker has not applied for dormitory space in 1981 and all rooms have previously been assigned to students making timely applications. Thus, Defendants conclude Brubaker will no longer be able to reside in a dormitory room, so his claim is moot. However, Plaintiffs deny that the dormitories are filled for the 1981-82 school year, so a material issue of fact exists as to whether Brubaker again will be able to live in a Penn State residence hall. Thus, a question remains as to whether Brubaker again will be subject to Penn State's policies regarding commercial transactions in residence halls. Therefore, at least at this stage of the litigation, summary judgment may not be granted in Defendants' favor as to Brubaker's claims on mootness grounds.

As to Plaintiff Wingert, Defendants claim that since he is no longer a student at Penn State and he has not filed an application for readmission to the school, Wingert too will no longer be residing in a Penn State dormitory room, so his claim is not capable of repetition. Again, there is a material issue of fact in dispute. Wingert, by affidavit, states that he intends to re-enroll in Penn State as soon as possible and intends to live in the Penn State residence halls. Thus, as with Brubaker, Wingert's claims cannot be disposed of in Defendants' favor on mootness grounds, at least at this stage of the litigation.

Defendants are entitled to summary judgment as to Brubaker and Wingert on other grounds. Brubaker and Wingert seek relief permitting them to invite AFS representatives to common areas in the individual dormitory rooms, to conduct sales demonstrations to groups of invited students in their rooms and in common areas of residence halls, and to invite AFS personnel to their dormitory rooms for the purpose of consummating sales of goods to other students following the demonstrations. Brubaker and Wingert were not parties to *American Future Systems I*, and are not bound by the doctrine of res judicata by the decision in that case. However, *American Future Systems I* constitutes binding legal precedent insofar as the legal issues involved are concerned. This Court in *American Future Systems I* did not address the question of First Amendment rights of Penn State students who are desirous of receiving information about the products which AFS sells and concluded that AFS did not have standing to assert the rights of those students. *American Future Systems I*, 464 F.Supp. at 1259. AFS again raised the claim that the First Amendment rights of Penn State students were being violated by Penn State's policy with regard to commercial activities within dormitories on its appeal in *American Future Systems I*. The Court of Appeals, addressing that claim, stated that "[t]he analysis contained in the text [of *American Future Systems I*] concerning the legitimacy of the restriction on AFS group sales in the residence halls applies as well to students who desire to purchase AFS products at group meetings. Also, we reiterate that the Penn State policy does allow an individual student to invite a sales representative into his or her room for the purpose of individually purchasing goods." *American Future Systems I*, 618 F.2d at 257, n. 16. To the extent that Brubaker and Wingert base their First Amendment claims on the right to conduct the same

types of demonstrations and sales that AFS seeks to conduct, they stand in no different position than AFS itself did in *American Future Systems I.* Indeed, Plaintiffs are in agreement with this position, stating that the student Plaintiffs' commercial free speech rights as listeners are reciprocal to AFS's rights, and *American Future Systems I* controls. (Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment at p. 13.) Since the Court of Appeals in *American Future Systems I* upheld the validity of Penn State's policy with regard to commercial activities in dormitories, and since Brubaker and Wingert stand on the same footing as did AFS, Penn State's policies do not violate Brubaker's and Wingert's First Amendment rights of commercial speech and Defendants will be granted summary judgment on this issue.

Brubaker and Wingert also assert that Penn State's regulations unconstitutionally inhibit their right of freedom of association arising under the First Amendment. Brubaker and Wingert claim that they have a fundamental right to associate themselves with one another and with AFS representatives in the setting of a group demonstration of AFS merchandise where all of them have the opportunity to hear and exchange information and views relating to AFS products, the effectiveness and fairness of the presentation, relevant price information, and also to consummate sales, if any one so chooses. (Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment at pp. 17-18). Brubaker and Wingert claim that Penn State's regulations infringe upon those associational rights. Brubaker and Wingert also claim that since the private dormitory room serves as a student's "home away from home," and the rooms are essentially equivalent to the "interior of a private home," the state lacks the power to control legal, non-destructive, freely formed associations within such rooms. (Plaintiffs' Brief

in Opposition to Defendants' Motion for Summary Judgment at p. 19.)

Plaintiffs conclude that since Penn State has failed to demonstrate a compelling state interest to sustain enforcement of its regulation on commercial activities in the dormitories, Penn State's regulations must fall.

While Plaintiffs make the argument that their associational rights stand on some different footing than their right as recipients of commercial speech, the Court is unpersuaded by this distinction. Indeed, as set forth in the Complaint, these associational rights are indistinguishable from the rights sought with respect to making group demonstrations and sales in dormitory rooms. In Count III of the Complaint, Plaintiffs list in broadside fashion their rights that have allegedly been violated: "[D]efendants have deprived said Plaintiffs of their rights of freedom of speech, privacy, and association under the constitution of the United States." Certainly, the primary purpose of the demonstrations is to encourage the attendees at the shows to purchase, merchandise. *See American Future Systems I,* 464 F.Supp. at 1258 (¶ 58).

The Court finds unpersuasive Plaintiffs' argument that since the Court of Appeals stated that Penn State had only a "legitimate interest" in continued enforcement of its regulations and not a "compelling interest" Brubaker's and Wingert's associational rights have been violated. (Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment at p. 20.) Where political-type relationships are impinged upon by regulation of the right to association, such regulation must be supported by a compelling state interest. *E.g.* NAACP vs. Alabama, 357 U.S. 449, 460 (1958). (Whether the beliefs sought to be advanced are political, religious, economic or cultural is immaterial). As is the case with commercial speech, commer-

cial associational rights, even those which are economically motivated, are afforded some protection under the First Amendment. *E.g.* International Union vs. National Right to Work Legal Defense & Education Foundation, 590 F.2d 1139, 1148 (D.C. Cir. 1978). The Plaintiffs cite no authority for the proposition that commercial associational rights such as those which are at issue in this case are on equal footing with political associational rights. Quite to the contrary, the relationship between political and commercial associational rights is analogous to the relationship between political and commercial speech rights. As the Supreme Court held in Ohralik vs. Ohio State Bar Association, 436 U.S. 447, 455-56 (1978), commercial and political activities must be treated differently.

> We have not discharged the "common sense" distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech . . . . To require a parity of constitutional protection for commercial and non-commercial speech alike would invite dilution, simply by a levelling process, of the force of the [First] Amendment's guarantees with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of non-commercial expression.

In *Ohralik*, the Court expressly held that commercial associational rights, while entitled to some constitutional protection, are subject to regulation in furtherance of im-

portant state interests. 436 U.S. at 458-59. *See* Central Hudson Gas & Electric Corp. vs. Public Service Commission of New York, ____ U.S. ____, 100 S.Ct. 2343 (1980); Virginia State Board of Pharmacy vs. Virginia Citizens Consumer Counsel, 425 U.S. 748 (1976).

The Court of Appeals has already held in *American Future Systems I* that legitimate and important interests of Penn State are furthered by its policy of governing commercial activity in the dormitories. Penn State asserts that AFS group sales significantly affect the primary activities of college dormitories. Penn State argues that its residence halls are exclusively dedicated to providing a living environment which is conductive to activities associated with being a student and succeeding academically and that AFS's activity within the residence halls will disrupt the proper study atmosphere and privacy of students. These interests are important enough to sustain Penn State's policy as against a challenge based on the right of association. *American Future Systems I*, 618 F.2d at 256-57.

Moreover, the Court fails to see how the restrictions imposed on Brubaker and Wingert infringe in any material way on the right to associate. As indicated above, Brubaker and Wingert may engage in sales demonstrations in common areas, and may consummate sales in the rooms of people purchasing the products. Brubaker and Wingert are of course free to conduct more extensive commercial activities at locations other than the dormitory halls of Penn State. Given the close nexus between associational freedoms and freedom of speech, NAACP va. Alabama, 357 U.S. 449, 460 (1958)), Brubaker and Wingert cannot demonstrate that the policy governing commercial activity violates their associational rights. The Defendants will therefore be granted summary judgment on this issue.

Brubaker and Wingert also claim that Penn State's regulations impermissibly infringe on their constitutional right of privacy, which they assert requires that they be permitted to conduct the commercial activity they desire in the dormitory rooms. Brubaker and Wingert state that they seek to establish their rights to be let alone in their choice of whom they may invite to their rooms, or whom they choose to visit, in a lawful, nondisruptive manner. Brubaker and Wingert argue that because the privacy and associational rights are so closely intertwined in this case, if the regulations cannot withstand scrutiny with respect to associational claims, the regulations must fall on privacy grounds for the same reasons. (Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment at pp. 23-24.) The Court agrees with these Plaintiffs' statement that privacy and associational rights should be treated equally in this case, but concludes that neither associational *nor* privacy rights have been violated. *See* Ohralik vs. Ohio State Bar Association, 436 U.S. 447, 455-56 (1978).

While the genesis of privacy rights is somewhat obscure, Griswold vs. Connecticut, 381 U.S. 479 (1965), a fundamental right to be free from unwanted governmental intrusions is implicit in the constitution. Roe vs. Wade, 410 U.S. 113 (1973); Stanley vs. Georgia, 394 U.S. 557, 564 (1969). It is equally true that the constitutional right of privacy extends to a college dormitory room, Piazzola vs. Watkins, 442 F.2d 284, 289-90 (5th Cir. 1971), as a college dormitory room is the equivalent of a student's "home away from home," *American Future Systems I,* 464 F.Supp. at 1262, and dormitory rooms are compared with the "interior of a private home," Brush vs. Penn State, 489 Pa. 243, 414 A.2d 48, 51 (1980).

The fact that students have privacy interests in their dormitory rooms, however, merely begins the inquiry. The

Supreme Court has recognized two kinds of privacy that are constitutionally protected. The first protects the individual from disclosure of certain matters and the second protects the individual from unwarranted governmental intrusion when the individual seeks to make certain personal decisions. Whalen vs. Roe, 429 U.S. 589, 599-600 (1977). Only the latter interest is relevant in this case. That interest, however, has been restricted to so-called fundamental matters "relating to marriage, procreation, contraception, family relationships, child rearing, and education." Paul vs. Davis, 424 U.S. 693, 713 (1976). The Plaintiffs, in apparent recognition of the fact that privacy rights established by Supreme Court decisions do not extend to the facts of this case, state that "the fact that certain aspects of the student-plaintiffs' privacy claims have not previously been considered and recognized by the Supreme Court does not preclude such recognition, by this Court." (Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment at p. 24.) This case does not involve some intrusion into Brubaker's and Wingert's ability to make decisions about personal matters of a fundamental nature; nor does Penn State's policy preclude personal relationships, since it affects only relationships for commercial purposes at certain locations. Further, it is not apparent how the shifting of a group demonstration from a dormitory room to a common area imposes any infringement at all upon Brubaker's and Wingert's freedom of thought, action, or belief. Moreover, any conception that privacy doctrines include the right to invite ten or more persons into one's room for a commercial demonstration is inconsistent with the notion of the "right of privacy" under Supreme Court case law. For these reasons, the Court declines Plaintiffs' invitation to expand the right of privacy in this case. Since Defendants have shown that, as a matter of law, Plaintiffs' right of privacy has not been violated by Penn State's policy regarding commercial ac-

tivities in dormitories, Defendants will be granted summary judgment as to this aspect of the case.

Brubaker and Wingert also claim that Penn State's policies abridge their rights under Pennsylvania Landlord and Tenant Law. Under § 504-A of the Landlord-Tenant Act, 68 P.S. § 250.554 (Supp. 1981), a tenant has the right to invite to his apartment or dwelling units such employees, business visitors, tradesmen, deliverymen, suppliers of goods and services, and the like as he wishes. Further, the tenant has the right to invite to this dwelling for reasonable periods of time social guests, family members and visitors. "It is the intent of this article to insure that the landlord may in no way restrict the tenant's right to purchase goods, services and the like from the source of the tenant's choosing . . ." 68 P.S. § 250.554. There is some controversy as to whether Pennsylvania's Landlord-Tenant Act is applicable to Penn State's dormitories. Even assuming that the Act is applicable to Penn State's dormitories, Brubaker and Wingert have not demonstrated that Penn State's regulations with regard to commercial activities in its dormitories violates the Act. Penn State does not prohibit Brubaker and Wingert from inviting an AFS representative to their rooms to make a sale. Penn State also does not prohibit Brubaker and Wingert from having social guests in their dormitory rooms. No reasonable construction of the Landlord-Tenant Act leads to the conclusion that Brubaker and Wingert are permitted to engage in broad commercial transactions in Penn State's dormitories. Thus, as a matter of law, Brubaker's and Wingert's rights under Pennsylvania's Landlord-Tenant Act have not been violated. Summary judgment will therefore be granted to Defendants on this issue.

III. **Plaintiff's DelValle, Varsics, Habacher, and Spiller.**

DelValle, Varsicks, Habacher and Spiller are Penn State students who do not reside in Penn State residence halls. They seek an order permitting them to attend and participate in AFS group presentations in common areas and dormitory rooms and to consummate sales from AFS in those rooms. (Complaint, Count IV.) These Plaintiffs were allegedly invited by Brubaker and Wingert to attend AFS demonstrations in private dormitory rooms. When Penn State ordered that these demonstrations not take place, on the ground that they were violative of Penn State's regulations regarding commercial activities in dormitories, these Plaintiffs claimed that their right to attend those demonstrations was violated.

In *American Future Systems I,* the Court of Appeals recognized that the First Amendment rights of the recipients of commercial speech are co-extensive with those of the speaker. *American Future Systems I,* 618 F.2d at 257 and 257 n. 16. The restriction on these Plaintiffs' ability to engage in commercial activity is even less than that placed on Brubaker and Wingert. The non-resident Plaintiffs are able to participate in an AFS demonstration in a common area of the residence hall but not in a dormitory room. Moreover, they might consumate a purchase of AFS goods anywhere except in a residence hall. It is presumed that Penn State cannot and does not prohibit these Plaintiffs from inviting an AFS representative to their own dwellings for demonstrations and sales. Thus, the Court fails to see how Penn State's regulations limiting commercial activities in its dormitories constitute any significant abridgement of these Plaintiffs' rights of speech, privacy, and association. Since these Plaintiffs have available all the alternative means of access to information about AFS products, the inconsequential restrictions imposed by

Penn State's regulations cannot be considered to be violations of these Plaintiffs' First Amendment rights. Linmark Associates, Inc. vs. Willingboro, 431 U.S. 85, 93 (1977). Reid vs. Barrett, 467 F.Supp. 124, 128 (D. N.J. 1979), *aff'd* 615 F.2d 1354 (3d Cir. 1980); Connecticut State Federation of Teachers vs. Board of Education Members, 538 F.2d 471, 479 (2d Cir. 1976). Defendants are therefore entitled to summary judgment as to these Plaintiffs' claims.

IV. **Arbitrary Enforcement of Penn State's Regulations.**

Plaintiffs' final claim is that Defendants in violation of Plaintiffs' due process rights, have not enforced the challenged regulations in an even-handed, fair, and non-arbitrary manner. Plaintiffs argue in support of their due process claim that Wolff vs. McDonnell, 418 U.S. 539, 558 (1974), stands for the proposition that "the touchstone of due process is protection of the individual against arbitrary action of government." *See also* Chung vs. Park, 514 F.2d 382, 387 (3d Cir. 1975).

As Plaintiffs admit, "of course, the predicate of a due process claim is governmental violation of a person's liberty interest." (Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment at p. 26, *adopting* Plaintiffs' Memorandum of Law in Support of Motion for a Preliminary Injunction at pp. 34-35.) It is certainly the case that were it established that Plaintiffs' constitutional rights of free speech, association and privacy were violated by Penn State's enforcement of its regulation regarding commercial activity in dormitories, this violation of Plaintiffs' rights would be within the zone of protected interest under the Fourteenth Amendment. *E.g.* Madera vs. Board of Education, 386 F.2d 778, 783-84 (2d Cir. 1967), *cert. denied*, 390 U.S. 1028 (1968), *citing* Allgeyer vs. Loui-

siana, 165 U.S. 578 (1897). However, the Court has found that Penn State's enforcement of its dormitory regulations does not violate any of Plaintiffs' collective constitutional rights or rights under Pennsylvania state law. Thus, even if Penn State's regulations were enforced in an arbitrary manner Plaintiffs' due process rights would not have been violated.

In addition, Plaintiffs' complaint and supporting affidavits over insufficient facts to support a claim of discriminatory enforcement of Penn State's policies. In this circuit, civil rights complaints must set forth facts with specificity, Rotolo vs. Borough of Charleroi, 532 F.2d 920, 922 (3d Cir. 1976), and this complaint fails to do so. Plaintiffs, in a conclusory manner, in Count II of their complaint, state that "by enforcing their stated policy, which purports to exclude from university residence halls all persons seeking to demonstrate or sell merchandise, in an arbitrary, capricious, selective, discriminatory, and unreasonable manner, Defendants have deprived Plaintiffs of their rights to due process under the Fourteenth Amendment of United States Constitution." (Complaint, Count II). The sole evidence now advanced in support of its allegation is the affidavit of Joseph Healey, which states in part:

> Ms. Peterson explained that the University cannot monitor the residence halls at all times. Therefore, there may be illegal presentations going on that the University does not know about. However, when the university becomes aware of an illegal presentation through a student complaint or other means, they enforce the rule.

This hardly establishes arbitrary and capricious enforcement of Penn State's policies. Indeed, it appears to establish consistent enforcement of the policies as soon as

the university is made aware of violations of its rules. Since Plaintiffs have failed to state a claim upon which relief can be granted with respect to this due process claim, summary judgment will be granted in Defendants' favor on this issue.

V. Conclusion.

The Plaintiffs have not established that Penn State's enforcement of its regulations with regard to commercial activity in its dormitories violates any of the Plaintiffs' constitutional rights or rights under Pennsylvania state law. Since there is no dispute of any material issue of fact in this case, Defendants' motion for summary judgment will be granted.

An appropriate order will be entered.

MUIR, U.S. District Judge

DATED; September 16, 1981

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

AMERICAN FUTURE SYSTEMS, INC., et al.,	:	
Plaintiffs	:	Civil No. 81-0171
vs.	:	Complaint Filed
	:	2/5/81
THE PENNSYLVANIA STATE UNIVERSITY, et al.,	:	(Judge Muir)
Defendants	:	

ORDER

1. Graves's motion to be joined as an additional Plaintiff is granted.

2. Defendants' motion for summary judgment is granted.

3. The Clerk of Court shall enter judgment in favor of all Defendants and against all Plaintiffs.

4. The Clerk of the Court shall close this file.

MUIR, U.S. District Judge

DATED: September 16, 1981

FILED
WILLIAMSPORT, PA.
SEP 16 1981
DONALD R. BERRY, Clerk
PER .....
DEPUTY CLERK

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2674

AMERICAN FUTURE SYSTEMS, INC.,
STEVEN BRUBAKER, RICHARD J. WINGERT,
W. BRUCE DEL VALLE, JOAN D. VARSICS,
DENNIS C. HABECKER, KEVIN GRAVES
and JOHN B. SPILLAR,

Appellants

v.

THE PENNSYLVANIA STATE UNIVERSITY,
BOARD OF TRUSTEES OF
THE PENNSYLVANIA STATE UNIVERSITY,
JOHN W. OSWALD, and M. LEE UPCRAFT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 81-0171)

Argued April 2, 1982
Before: GIBBONS, SLOVITER and BECKER,
Circuit Judges

(Filed August 9, 1982)

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OPINION OF THE COURT

SLOVITER, *Circuit Judge.*

Plaintiff American Future Systems, Inc. (AFS) filed suit against Pennsylvania State University, its trustees and agents (jointly referred to as Penn State) alleging that Penn State's application of its policies relating to commer-

cial activities in the common areas of its student residence halls violated its First and Fourteenth Amendment rights to free commercial speech as established by this court in an earlier opinion. Several students at Penn State also joined as plaintiffs alleging that Penn State's policies with regard to activities in the common areas and in the dormitory rooms violated, *inter alia,* their noncommercial free speech rights and right to privacy. Plaintiffs appeal the district court's grant of defendants' motion for summary judgment. We reverse and remand.

I.

BACKGROUND

AFS is a corporation which engages in the sale of cookware, crystal, and tableware through demonstrations of its merchandise at colleges throughout the United States. These demonstrations are attended by a student hostess, invited guests and a sales representative. Four of the student plaintiffs, Bruce Del Valle, Joan D. Varsics, Dennis C. Habecker and John B. Spillar, are current Penn State students who do not reside in the University residence halls. Plaintiff Keven Graves is a Penn State student who currently resides in the residence halls. Plaintiffs Steven Brubaker and Richard J. Wingert were living in the University residence halls at the time the action was filed.[1] It is conceded that as long as one plaintiff is a student who resides in the residence halls to which the contested regulations apply, the issues are properly before us.

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[1] Wingert withdrew from Penn State in February 1981. Brubaker is still a student at Penn State, but no longer resides in the residence halls.

In the prior opinion rendered in the earlier action brought by AFS we described Penn State's policies and regulations covering commercial activities in its dormitories in detail. *See American Future Systems, Inc. v. Pennsylvania State University,* 618 F.2d 252 (3d Cir. 1980) (*American Future Systems I*). These regulations and policies have not changed to any significant extent. App. at 322a. In summary, the student housing contract provides "[t]he conducting of any business enterprise for personal profit is prohibited in or around the university operated units." The student handbook states:

> "The institution . . . has rights and responsibilities of its own. The rights and responsibilities of the institution include: . . . [the] [r]ight to prohibit individuals and groups who are not members of the University community from using its physical and operating facilities for commercial . . . activities."
>
> "Lectures, concerts, demonstrations, displays, or exhibits may not be used in any manner as a means of promoting commercial companies, products, or services."
>
> "The word 'commercial' . . . means any activity or event which results in personal financial gain to the peddler or organization thereof, provided that contact between a peddler and a student shall not be deemed commercial if such contact was invited by the individual student involved."
>
> "Persons who are not students or employees of the University, while on University property, are required to . . . abide by University policies and regulations."

618 F.2d at 253 (citations omitted).

Penn State's interpretation of these policies and regulations as relevant to the issues in this case is set forth in its brief as follows: "Under that policy, AFS may conduct group demonstrations of its products in common areas of Penn State residence halls. No solicitation of sales or sales may occur in those demonstrations. Following that demonstration, or by direct mail or telephone, AFS may secure invitations from a student to solicit sales and sell merchandise to that student in his or her dormitory room." Brief of Appellees at 5.[2] AFS challenges the manner of application of the regulation to the demonstrations in common areas of the residence halls. The student plaintiffs challenge the preclusion of demonstrations in the dormitory rooms. The issues will be considered separately.

II.

AFS'S CHALLENGE

In *American Future Systems I,* AFS had challenged Penn State's regulation of group commercial activities in the residence halls. AFS had conducted and scheduled future demonstrations in the residence halls of Penn State. As part of such demonstrations, AFS conducts other solicitation activity including door-to-door visits accompanied by the student hostess to seek guests for the

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[2]In *American Future Systems I,* 464 F. Supp. 1252, 1256 (M.D.Pa. 1979), the district court found that:

> A sales demonstration put on by American Future Systms generally proceeds in two parts: A demonstration of the American Prestige Series products including a comparison of those products with other merchandise and an explanation of why American Prestige products are superior, and a sales portion where interested students are given an opportunity to purchase products on an installment plan basis.

demonstration. The demonstrations were halted by University officials because they violated the policy banning commercial activity. "When AFS protested that it had a constitutional right to solicit sales within the residence hall, a Penn State official told AFS that it would be permitted to conduct the demonstration portion of its show if no attempts were made to sell merchandise to the students during the presentation. AFS rejected that arrangement, stating that the sales portion was absolutely crucial." 618 F.2d at 254 (footnote omitted). In affirming the judgment entered in Penn State's favor, we emphasized that Penn State had not "totally suppressed" commercial speech, but "merely restricted that speech somewhat." *Id.* at 258. We stressed that "not only is AFS free to sell its goods elsewhere than in the residence halls, it can even enter those halls, upon invitation, and set up group demonstrations of its products. All that it is restricted from doing is actually completing in those halls its desired commercial transactions." *Id.* at 259.

Shortly thereafter, AFS requested that Penn State permit it to conduct group demonstrations in individual students' rooms. App. at 20a. Under its proposed scheme actual consummation of sales would occur in the purchaser's own room on a one-on-one basis. Penn State rejected this proposal on the ground that such activity would not conform with University policy. *Id.* at 22a.[3] AFS

[3]In a letter dated October 3, 1980, counsel for Penn State explained the reason for rejecting AFS' proposal as follows:

> Generally speaking, requests [to conduct group demonstrations in the public areas of the dormitories] are honored where the "demonstration" has educational value, does not interfere with the normal activity of the area and does not involve an outright solicitation of a commercial sale.
>
> The "demonstration" may result in the consummation of a commercial transaction if the student pursues the matter

then proposed that it be permitted to present group demonstrations in the common rooms of the residence halls. App. at 29. It forwarded to the University a copy of the printed text (consisting of 76 cue cards) of its proposed presentation and explained that the material contained in cards 1 through 67 would be presented in the group demonstration, whereas the material in the remaining cards would be "modified for a one on one closing transaction." *Id.* at 30a. Thereafter, University officials reviewed the cards and determined that although "the presentation does contain much material of an educational nature which would be permitted," certain of the material contained "an outright group commercial solicitation which is contrary to University policy." *Id.* at 69a. In a letter to AFS, dated November 20, 1980, Penn State's counsel enumerated which material – primarily those cue cards

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> at the place of business of the vendor or if the student invites the vendor to his or her room to meet on an individual basis. In addition, an individual student may invite a vendor to the student's room, whether or not a "demonstration" has occurred for the consummation of a commercial solicitation and sale with that student only.
>
> However, group "demonstrations" or group sales by commercial organizations, or other who are not residents, are not permitted in the private areas of the residence halls, including the rooms of the students.
>
> The purpose behind these distinctions is to try to achieve a balance between the personal needs of the individual student and the needs for privacy and maintenance of a proper study atmosphere for large numbers of students living in communal facilities.
>
> Although these distinctions may not be entirely logical, and although it may be difficult to tell the difference between a "demonstration" and an outright commercial solicitation, the policy by an large has achieved its purpose.

App. at 26a-27a.

containing price, guarantee and payment plan information — was not permissible."[4]

In this action for injunctive and declaratory relief, AFS seeks an order "requiring the University to comply with this court's prior interpretation of the effect of its regulations" and thus to allow AFS to present uncensored group demonstrations in the common areas of the residence halls upon invitation by a resident student and to consummate sales on a *one-on-one* basis with a student who has invited an AFS representative back to his or her private dormitory room. The district court denied plaintiffs' motion for a preliminary injunction without a hearing, *American Future Systems, Inc. v. Pennsylvania State University*, 510 F.Supp. 1983 (M.D. Pa. 1981), and subsequently, again without giving plaintiffs a hearing, granted Penn State's motion for summary judgment. *American Future Systems, Inc. v. Pennsylvania State University*, 522 F.Supp. 544 (M.D. Pa. 1981).

AFS argues that Penn State's refusal to allow it to present uncensored sales demonstrations in the common areas of University residence halls is violative of its First Amendment rights and contrary to this court's prior interpretation of what commercial activity Penn State may permissibly prohibit in its residence halls. The district court

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[4]The letter stated that "the material starting with the bottom paragraph of card 14 through the second paragraph on card 18 is not permissible because cooking by students, or anyone else, is not permitted in the residence halls." App. at 69a. The letter also rejected the material on cards 24-31 (relating to the price of AFS's china and guarantee and payment plans offered to students); the first paragraph of card 37 (relating to the price of AFS's crystal); cards 52-65 (relating to the price of AFS's cookware and package plans, guarantee and payment plans, and the Florida holiday drawing); and "those portions of cards 66-67 which involve the distribution of contracts to the group." *Id.*

rejected these contentions primarily on the ground that they were barred by the doctrine of res judicata. It construed AFS's claims as an attempt to relitigate claims which either were advanced and decided in the first action or which could have been advanced. 522 F.Supp. at 548. It rejected AFS's claim that the University's attempt to censor its sales demonstrations was violative of the First Amendment on the ground that this court had "specifically upheld Penn State's regulations to the extent they rested upon a distinction between commercial and non-commercial speech." *Id.* at 549. Finding that "the question of whether particular aspects of AFS's presentations were educational or commercial" was not barred by res judicata, the district court independently examined the 67 cue cards at issue and found that those cards containing price, credit and guarantee terms constituted impermissible solicitation. It therefore, upheld Penn State's prohibition of cards 24-31, the first paragraph of card 37, 52-65, and portions of cards 53-67. See note 4, *supra.*

We disagree with the district court's conclusion that the claims advanced by AFS in this appeal are barred by res judicata. At the time of our prior decision, there had been no attempt by the University to censor AFS's sales demonstrations by prohibiting those portions of its demonstration containing information relating to the price of AFS's products and the company's credit and guarantee terms. The parties have agreed in oral argument before us that no issue as to the contents of the demonstration, as distinguished from the consummation of the transaction, was involved in the first action.

It is important at the outset to clarify which issues are not before us. Although AFS construes our decision in *American Future Systems I* as having established its constitutional free speech right to conduct demonstrations of

a commercial product in common areas within the University's residence halls we do not read that opinion so broadly. Penn State has not sought to bar all commercial activity from its residence halls. It has limited what ostensibly appears to be such a ban through its definition of "commercial" which excludes student contact with a peddler "if the contact was invited by the individual student involved." Therefore we need not decide whether a state University may properly ban all commercial activity in its residence halls. Similarly, AFS does not challenge the distinction which the earlier opinion made between an actual consummation or completion of the "commercial transaction" and a group demonstration of AFS's products. 618 F.2d at 258-59. Instead it seeks only to conduct the demonstration in the common areas without censorship of the contents of that demonstration.

Finally, although the University has conceded that portions of the demonstration may have some educational value, and it and the district court sought to draw the line between those portions of the demonstration which they deem educational and those portions which they deem commercial, it is unmistakable that the demonstration is geared to the sales of the products and represents commercial speech.[5] Thus the only issue is whether Penn State may censor the content of AFS's commercial speech conducted in the dormitory common rooms where AFS has been permitted by the University to conduct its sales demonstrations.

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[5]It may be wishful thinking to assume that most student guests attend the demonstrations for their educational value. Students are told in advance that those who attend are eligible to participate in the drawing of a winner of a four-day vacation in Florida. *See American Future Systems I*, 618 F.2d at 254.

The principle that commercial speech is protected from unwarranted government interference by the First Amendment, as applied to the states through the Fourteenth Amendment, was established in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). That protection extends to price information as well as advertising. *See Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). Commercial speech, however, allows greater regulation than non-commercial speech, *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978).

In Central *Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 566 (1980), the Supreme Court summarized the constitutional test for restrictions on commercial speech as follows:

> For commercial speech to come within [the First Amendment], it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the government interest asserted and whether it is not more extensive than is necessary to serve that interest

In *Ad World, Inc. v. Township of Doylestown*, 672 F.2d 1136, 1139 n. 6 (3d Cir.), *cert. denied*, 102 S.Ct. 2240 (1982), we stated that advertisements may be regulated to insure their truthfulness and to prevent harm to the public. *See also Beneficial Corporation v. F.T.C.*, 542 F.2d 611, 1619 (3d Cir. 1976), *cert. denied*, 430 U.S. 983 (1977), ("the remedy for the perceived violation can go no further in imposing a prior restraint on protected commercial speech than is reasonably necessary to accomplish the remedial objective of preventing the violation").

In the instant situation, there has been no allegation that AFS's commercial speech activities are fraudulent, misleading or otherwise unlawful. As the Supreme Court emphasized in *Central Hudson:*

> The limitation on expression must be designed carefully to achieve the State's goal. Compliance with this requirement may be measured by two criteria. First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.

447 U.S. at 564.

We, therefore, must first determine whether the University has advanced a substantial government interest to be achieved by the restrictions at issue. The only interest advanced by Penn State for precluding information on the price of the company's products and the nature of the contract it enters into with purchasers is that asserted in the prior action before this court – *i.e.* its interest in maintaining the proper study atmosphere in its dormitories and in protecting the privacy of the students residing in those facilities. Restrictions on the *contents* of the demonstration as distinguished from the conduct of the demonstration cannot further these interests. The Supreme Court cases provide ample precedent for the proposition that price information has value. *See Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, U.S. at 364. The University does not contend that the mere act of convening a group in the common areas of the residence halls is inimical to the study atmosphere since its

policy permits such group activity. We conclude that Penn State has failed to show a substantial state interest, much less a plausible explanation, for its policy differentiating between the nature of the information contained in the AFS demonstration. We therefore reverse the summary judgment entered in Penn State's favor.

III.

STUDENT'S CLAIM

The claims of the students vary from that asserted by AFS. In January 1981, plaintiffs Wingert and Brubaker each informed the University that, with the consent of their roommates, they would be hosting a group demonstration of AFS products in their individual dormitory rooms. App. at 71a, 73a. Plaintiffs Del Valle, Varsics, Habecker, and Spillar were invited and planned to attend the group demonstrations. Penn State informed both Wingert and Brubaker that they would not be permitted to host such presentations in their dormitory rooms, but would be allowed to host the demonstration in a common room of the residence hall if the demonstration did not involve "a solicitation to purchase or a sale of any products." *Id.* at 72a, 74a. A common room was reserved by the University for each student's use. *Id.* The students joined this action, seeking relief permitting them "(1) to make purchases in a group setting, if they so desire, at a demonstration presented in a common room within the residence halls, and, in addition, (2) to host and participate in informational and sales demonstrations in a student's private dormitory room, including the right to complete a sales contract at that time in the group setting or, at their option, to make a purchase at a later time in a private setting." Appellants' brief at 25.

The students' claim directed to the distinction which the University makes between the demonstration and consummation of the transaction in the common areas is one that was before this court in *American Future Systems I*. In granting summary judgment against the student plaintiffs, the district court recognized that they were not parties to *American Future Systems I* and are not bound by the doctrine of res judicata by the decision in that case. 522 F. Supp. at 551. Nonetheless, the court considered that our prior decision constitutes binding legal precedent insofar as the legal issues are concerned. We also are bound by the prior panel opinion. Internal Operating Procedures of the Third Circuit, Ch. VIII. C. (1980). Fairly read, the court in *American Future Systems I* sustained the validity of the distinction between the demonstration and the consummation of the transaction, and it did so after considering not only AFS's right to deliver the speech but the "students" rights to take part in the sales there." *See* 618 F.2d at 257 n. 16. Therefore, the district court did not err in rejecting the students' claims with respect to the demonstration in the common areas.

The students also challenge the University restriction of the use to which they may put their dormitory rooms by preventing the group demonstrations. They invoke their rights to free speech, associational interests, privacy, due process, and section 504-A of the Pennsylvania Landlord Tenant Act. Each of these claims was rejected by the trial court in granting summary judgment for Penn State. We focus primarily on the students' claimed right of free speech and associational interests.

The students argue that they have established by affidavit that the primary reasons for desiring to participate in the AFS presentations were educational, social, and cultural rather than commercial, that the district court

failed to consider their noncommercial free speech rights, and that such rights deserve a higher level of protection than commercial speech. They claim that "the state must demonstrate a compelling state interest for the regulation" and that the regulation must be narrowly drawn. The Amicus American Civil Liberties Union argues that to the extent Penn State's regulations prohibit students from gathering in their own dormitory rooms to hear AFS's presentations, they violate the First Amendment because the "interest in protection of privacy and study atmosphere, whatever its sufficiency as grounds for the university's restrictions on use of the common rooms, does not meet constitutional requirements as a justification for prohibitions against students hearing commercial presentations in a student's own room" American Civil Liberties Union Brief at 8.

The district court does not appear to have considered the students' associational and free speech rights in the activities in their dormitory rooms independently from the activities conducted in the common areas. In its argument before us, Penn State represented that all organized group activity is prohibited in the dormitory rooms and must be conducted in the common areas, and that this policy applied to political as well as commercial activity. If this were the case, Penn State may indeed have a satisfactory reason for distinguishing between group activity in individual dormitory rooms and in common areas which can be observed by others. Such reasons may relate to the safety and well being of the students and the facility by which their security can be protected. The difficulty is that on this record we do not know whether there is a blanket prohibition against all organized group activity, and there have been no findings made by the district court as to the basis for such a prohibition.

It is undisputed that even speech entitled to the highest First Amendment protection may be subject to reasonable time, place, and manner regulations that are content-neutral, serve a significant governmental interest, and that leave open ample alternative channels for communication of the information. *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 647-48 (1981). In this case the absence of any record on this issue and any findings by the district court makes this an inappropriate case for summary judgment. The University's reliance on the need to preserve a study atmosphere, asserted also in defense of this regulation, is unsupported by any evidence in this record and there is no basis to bind the students, who were not parties in the prior litigation, by any evidence which may be on record in that case. Therefore we will not speculate about the validity of the line drawn by the University between activity in the common areas of the dormitory and the dormitory rooms themselves.

As the district court found, plaintiffs' due process claim depends on finding some predicate right in the form of a liberty interest. Since the district court had rejected plaintiffs' proffered free speech right, it concluded there was no such liberty interest implicated. Since we have concluded that it was inappropriate to grant summary judgment against the student plaintiffs on this ground, it follows that the district court will need to reexamine the plaintiffs due process claim. At that time, plaintiffs may seek to amend the complaint to provide, if they can, the specificity which the district court found lacking.

Because we must remand this matter to the district court, we will also reach for its guidance the students' contention that the Penn State policies violate their constitutional right to privacy which encompasses their right to receive visitors in their dormitory rooms and to be received

as a visitor in the privacy of a fellow student's room. We have previously commented that "the full measure of the constitutional protection of the right to privacy has not yet been delineated." *United States v. Westinghouse Electric Corp.*, 638 F.2d 570, 577 (3d Cir. 1980). In *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977) the Supreme Court referred to two types of privacy interests: "One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." The latter decisions have encompassed "matters relating to marriage, procreation, contraception, family relationships, and child rearing and education." *Paul v. Davis*, 424 U.S. 693, 713 (1976). An individual student's right to privacy is not abrogated because the student has chosen to live in a University dormitory. On the other hand, the intimate personal nature of the rights previously accorded privacy protection is a far cry from the right asserted here, the right to host and attend a demonstration of cookware. We are unwilling to extend the constitutional right of privacy to commercial transactions completely unrelated to fundamental personal rights and therefore affirm the district court's rejection of that basis of plaintiffs' claims.[6]

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[6]The district court rejected the claim of Brubaker, Wingert, and Graves that Penn State's policies abridge their rights under § 504-A of the Pennsylvania Landlord and Tenant Act, 68 P.S. § 250.544. That section provides:

> The tenant shall have a right to invite to his apartment or dwelling unit such employees, business visitors, tradesmen, deliverymen, suppliers of goods and services, and the like as he wishes so long as his obligations as a tenant under this article are observed. The tenant also shall have right to invite to his apartment or dwelling unit, for a reasonable period of time, such social guest, family or visitors as he wishes so long as his obligations as a tenant under this article are observed. These rights may not be waived by any

For the foregoing reasons, we will reverse the grant of summary judgment for the defendants and will remand this matter to the district court for further proceedings consistent with this opinion.

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provisions of a written rental agreement and the landlord and/or owner may not charge any fee, service charge or additional rent to the tenant for exercising his rights under this act.

It is the intent of this article to insure that the landlord may in no way restrict the tenant's right to purchase goods, services, and the like from a source of the tenant's choosing and as a consequence any provision in a written agreement attempting to limit this right shall be void and unenforceable in the courts of this Commonwealth.

The parties disagree as to whether this statute applies to Penn State's dormitories and have referred us to no relevant Pennsylvania court decision construing this statute. Under these circumstances, and since the student's claims may be resolved on the basis of other federal issues, it is unnecessary at this time to reach this issue.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2674

AMERICAN FUTURE SYSTEMS, INC., STEVEN BRUBAKER, RICHARD J. WINGERT, W. BRUCE DEL VALLE, JOAN D. VARSICS, DENNIS C. HABACHER, JOHN P. SPILLER, and KEVIN GRAVES,

Appellants

v.

THE PENNSYLVANIA STATE UNIVERSITY, BOARD OF TRUSTEES OF THE PENNSYLVANIA STATE UNIVERSITY, JOHN W. OSWALD and M. LEE UPCRAFT,

Appellees

AMERICAN FUTURE SYSTEMS, INC., etc. et al.,

Appellants

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, and BECKER, *Circuit Judges*

The petition for rehearing filed by appellees, The Pennsylvania State University, Board of Trustees of The Pennsylvania State University, John W. Oswald and M. Lee Upcraft, in the above entitled case having been submitted to the judges who participated in the decision of

this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

Circuit Judge

Dated: September 21, 1982

OPINION SUR PETITION FOR REHEARING

SLOVITER, *Circuit Judge.*

Under ordinary circumstances, the petition for rehearing and for rehearing in banc filed by appellees ("Penn State") which raises issues previously raised and rejected by an undivided panel of this court in its decision would not warrant any comment in conjunction with the order denying said petition. However, because five members of this court have joined in a statement which does not suggest that the panel's statement of the applicable law is incorrect, and have nonetheless voted for rehearing in banc notwithstanding our general policy to the contrary, *see* Internal Operating Procedures of the Third Circuit, Ch. VIII. B (1980), this may create some confusion when the case is remanded to the district court. Therefore a reiteration of the issues raised in the appeal, addressed in the opinion and decided by the court is called for.

The statement of Judge Adams that the opinion in this case may cause state universities to "lose a significant portion of their control over commercial activity on their campuses" overstates the issue, the record and the opinion in this case. Neither in *AFS I* nor *AFS II* was this

court presented with the issue of the scope of a state university's power to close its residence halls to all commercial activity.

The issue decided by the court in *AFS I* was the validity of the distinction made by Penn State between the group demonstration and the consummation of sales. All of the parties, including counsel for Penn State, agreed at oral argument before this court that the issue of Penn State's restriction on the content of the group demonstration had not been raised or decided in *AFS I*. In *AFS II*, the court was faced with that issue, the right of the University to review the material which AFS would present in the group demonstration and to prevent AFS from including material referring to price, guarantee and payment plans in its group demonstration. Since the restriction which Penn State has placed on AFS is a content-based restriction on the material that it may include in its group demonstration, Judge Adams' statement that "The primary restriction [placed on plaintiff] appears to be that sales may not be consummated in the common areas of a dormitory" is surprising. Furthermore, a content-based restriction can hardly be characterized as a "minimal limit".

The suggestion implicit in Judge Adams' statement that the opinion in *AFS II* may narrow the range of options open to a state university interested in resisting use of the school premises to promote sales of merchandise overlooks the significant fact that Penn State, for whatever reason, has not resisted such sales. The record and the opinion in this case show that Penn State permits group demonstrations in common areas and consummation of the commercial transaction in the individual students' rooms. The district court granted summary judgment for Penn State on the challenge by AFS to Penn State's actions in restricting the content of the group demonstrations in common areas and on the students' challenge to the prohibition of group demonstrations in their dormitory rooms. *AFS II* held the summary judgment as to the AFS claim could not be upheld because

Penn State had "failed to show a substantial state interest, much less a plausible explanation, for its policy differentiating between the nature of the information contained in the AFS demonstration." *American Future Systems, Inc. v. The Pennsylvania State University*, No. 81-2674, slip op. at 12 (3d Cir. August 9, 1982). It also held that there was no evidence in the record to justify the restriction with regard to the dormitory rooms because Penn State had not introduced any relevant evidence in this case in that regard. *Id.* at 15.

The opinion can hardly be considered to have enunciated either a new or disputed legal principle by requiring that a state university desirous of regulating commercial speech must show that such regulation furthers substantial state interests. In the most recent Supreme Court decision omitted from the series of cases referred to by Judge Adams, the Court cautioned that although a state may regulate commercial speech, "the First and Fourteenth Amendments require that they do so with care and in a manner no more extensive than reasonably necessary to further substantial interests." The Court stated that states retain the authority to regulate advertising that "is inherently misleading or that has proven to be misleading in practice" and to promulgate "carefully drawn restrictions" which further other substantial state interests. *In re R- M. J-*, 102 S.Ct. 929, 939 (1982). *See also Ad World, Inc. v. Township of Doylestown*, 672 F.2d 1136, 1139 n.6 (3d Cir.), *cert. denied*, 102 S.Ct. 2240 (1982).

The decision in this case leaves open to Penn State the opportunity on remand to produce evidence to show a substantial state interest to support its policy. In light of the incomplete record in this case and the preliminary stage at which this issue reached the court, it would hardly promote judicial economy and efficiency to have in banc consideration of the abstract issue alluded to by Judge Adams with respect to a state university's power to resist commercial activity.

JUDGE ADAMS dissents from the denial of rehearing, and makes the following statement:

Prior to 1975, commercial speech had no sanctuary in the First Amendment. Then in *Bigelow v. Virginia*, 421 U.S. 809 (1975), the Supreme Court held that the First Amendment protected the right of a Virginia newspaper to run advertisements which announced that abortions were legal in New York and offered the services of a New York referral agency. The statute in question banned all publications that prompted the procuring of an abortion. The court emphasized the great public interest in the subject matter. A year later, in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), the Court relied on *Bigelow* to hold that a Virginia statute that completely barred pharmacists from advertising the sale of prescription drugs was unconstitutional. A primary reason for this result was the Court's concern that "the poor, the sick, and the aged" might be substantially disadvantaged by this law. The lack of important information regarding needed medication could seriously limit their "enjoyment of basic necessities [of life]." 425 U.S. at 763-64.

The Supreme Court's next decision in this area was *Bates v. State Bar*, 433 U.S. 330 (1977), which struck down an Arizona Supreme Court rule which completely prohibited *any* advertising by a lawyer. One of the essential predicates of the *Bates* decision was that many citizens in Arizona and elsewhere were not obtaining legal assistance even when they needed counsel because of their fears regarding the price of such advice or because of their inability to locate a competent attorney.

In *Ohralik v. Ohio State Bar*, 436 U.S. 447 (1978), the court ruled that a state may forbid in-person solicitation of prospective clients by lawyers for pecuniary gain, and noted the distinction between commercial and noncommercial speech. Speaking for the Court, Justice Blackmun said:

> We have not discarded the "commonsense" distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech. *Virginia Pharmacy*. To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commerical speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial [expression].

In our case, a governmental unit, here a state university, has not barred completely any advertising regarding plaintiff's products. Nothing prevents the plaintiff from communicating price information by placing signs on the school's bulletin boards or mailing circulars to the students, or even coming on the premises and presenting their merchandise to the students. The primary restriction seems to be that sales may not be consummated in the common areas of a dormitory. Penn State apparently has attempted to implement this restriction by placing minimal limits on the format of the group demonstration. No one has shown the great need for permitting sales of merchandise to be conducted in this manner.

I have a serious question whether a reasonable reading of *Bigelow*, *Virginia Pharmacy*, *Bates*, and *Ohralik* can yield a conclusion that a state university is *constitutionally* limited to a narrow range of options in regulating third parties permitted on school premises to promote sales of merchandise. I believe this matter should be addressed by the entire Court and the subject

carefully considered before signals are sent to state universities indicating that they may well lose a significant portion of their control over commercial activity on their campuses.

I am concerned that, unless the courts are prepared to step back and take a careful review of the precedents, the extension of a juridical concept by a dry and remorseless logic can carry us to a position never contemplated by the Supreme Court when this doctrine was first propounded. Moreover, it is a position totally incompatible with our societal concerns.[1]

Judges Aldisert, Hunter, Weis and Garth join in this statement.

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Clerk of the United States Court of Appeals
for the Third Circuit

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1. As the Chief Justice has reminded us: " 'All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded. . . .' " *United States v. 12 200-Ft Reels of Super 8 Mm. Film*, 413 U.S. 123 (1973), *quoting Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355 (1908) (Holmes, J.).

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

AMERICAN FUTURE SYSTEMS, INC., et al.,	:	
Plaintiff	:	Civil No. 78-262
vs.	:	Complaint Filed
	:	3/17/78
THE PENNSYLVANIA STATE UNIVERSITY, et al.,	:	(Judge Muir)
Defendants	:	

APPEARANCES:

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FILED
WILLIAMSPORT, PA.
FEB 2 1979
DONALD R. BERRY, Clerk
PER SE
DEPUTY CLERK

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

AMERICAN FUTURE SYSTEMS, INC., et al.,	:	
Plaintiff	:	Civil No. 78-262
vs.	:	Complaint Filed
	:	3/17/78
THE PENNSYLVANIA STATE UNIVERSITY, et al.,	:	(Judge Muir)
Defendants	:	

OPINION

MUIR, District Judge.

I. Introduction

The Plaintiff, American Future Systems, Inc., a corporation whose principal business is the sale of cookware, china, crystal, and silverware to college women, brought this action against the Pennsylvania State University (Penn State), the Board of Trustees of that University, John W. Oswald, the President of Penn State, and M. Lee Upcraft, the Director of Residental Life programs at Penn State, seeking a judgment declaring that Penn State's actions in banning American Future Systems representatives from the University Park Campus in the fall of 1977 were unconstitutional and requesting the Court to enjoin Penn State from enforcing its policy against commercial solicitation on the campus to preclude American Future Systems from selling its wares to Penn State students. The case was tried before the undersigned judge sitting with an advisory jury from January 5, 1979 to January 11, 1979.

The advisory jury answered a series of special verdict questions indicating its belief that the sole purpose of American Future Systems' visits to the Penn State campus was to sell its merchandise, that American Future Systems used gifts and other inducements as means of persuading Penn State students to invite their representatives on campus, that American Future Systems had a policy of applying different credit practices to freshmen and minority students than to upperclass Caucasian purchasers, that American Future Systems either concealed or failed to reveal certain information to persons in attendance at American Future Systems shows at which its wares were sold with respect to a Florida holiday drawing, and that American Future Systems was excluded from the Penn State Campus because it conducted commercial activities for profit rather than because of Penn State's disapproval of either its credit practices or the "Florida holiday" drawing. The following represent the Court's findings of fact, discussion, and conclusions of law.

II. Findings of Fact.

1. American Future Systems, Inc. is a corporation with a principal place of business at 715 Lancaster Avenue, Bryn Mawr, Pennsylvania, 19010.

2. Edward M. Satell is the President of American Future Systems.

3. Defendant John W. Oswald is the President of Pennsylvania State University (Penn State).

4. M. Lee Upcraft is the Director of Residential Life Services at Penn State.

5. Penn State has adopted a policy with respect to fund raising on campus which is set forth both in the

terms, conditions, and regulations of the housing and food service contract for undergraduate residence halls and dining halls of the Pennsylvania State University (P5) and in the student handbook at page 82, ¶ 3, subsection (a)(8).

6. The terms, conditions, and regulations of the housing and food service contract state on page 35 as follows: "The conducting of any business enterprise for personal profit is prohibited in or around the university-operated units."

7. The student handbook at page 82, ¶ 3, sub-§ (a)(8) reads as follows: "Fund-raising activities are subject to the following restrictions: (8) Lectures, concerts, demonstrations, displays, or exhibits may not be used in any manner as a means of promoting commercial companies, products, or services."

8. In addition to regulating commercial sales, Penn State has adopted certain policies relating to solicitation, which is defined as donations or sales of products for the benefit of non-university charitable organizations, canvassing, which is defined as any effort to influence student opinions specifically excluding solicitation or fund-raising, visitation of students in their rooms either by university or non-university individuals, and the manner by which students are permitted to have overnight guests in a residence hall.

9. Although Penn State prohibits the use of residence hall areas for the benefit of commercial organizations, an individual student who intends to purchase goods or services is permitted to invite a vendor of those goods or services to the residence hall for the purpose of transacting business with him.

10. Penn State's policy against commercial solicitation does not prohibit vendors from attempting to sell their merchandise to Penn State students by means of telephone communication directed into the residence halls.

11. The telephone numbers of students residing in a particular residence hall are available in the lobby of that building.

12. Members of the general public who have not been invited into a residence hall for a specific purpose may enter the lobby of a dormitory in order to examine the list of phone numbers.

13. A "no trespassing" sign is posted at or near the entrance of each residence hall on the Penn State Campus.

14. The residence halls at Penn State contain a number of rooms ranging between 24 and 300 each and there are a total of 6,900 rooms on the University Park Campus. Residence hall facilities are reserved for the use of residence hall residents and their properly invited visitors or guests.

15. Most residence halls on the Penn State Campus have a study lounge designed to be occupied by three to 12 persons as well as other common areas, including bathrooms, storage rooms, and laundry rooms.

16. Any student living in the residence halls at Penn State signs a housing contract which states that he has read the terms and conditions regulating the use of such residence halls and agrees to abide by those terms.

17. The basis of Penn State's policy against commercial activity within the residence halls is the view of the members of the Residential Life Services department that the proper study atmosphere and privacy of the students

would be impossible to maintain if commercial vendors were permitted to attempt to conduct sales activities within the residence halls.

18. Penn State's policy against commercial activities on campus does not prevent commercial businesses from advertising in student newspapers or on student radio stations.

19. There is no restriction placed by Penn State on the content of commercial items mailed to Penn State students by means of the United States mails.

20. American Future Systems is engaged in the business of selling cookware, china, crystal, and silverware to college-age women.

21. The sales activities of American Future Systems, Inc. which are relevant to this case relate to attempted sales of a selected number of patterns of china, crystal, silverware and cookware known collectively as the "American Prestige Series."

22. American Prestige Series goods are generally sold at demonstrations or shows attended by the "hostess," a "sales representative," and a number of invited guests.

23. With respect to its sales to college students, American Future Systems operates by having either its "booking office," located at its headquarters in Bryn Mawr or its sales representative who has responsibility for that geographic area in which the college is situated seek out a particular college student by telephone and asking her if she would like to host an American Prestige show on campus.

24. At the time of the initial telephone contact, a student hostess is informed that if she hosts the show, she will

be given a tote bag and that there is the possibility that one of the attendees of the show, including herself, will win a "Florida holiday."

25. The value of the tote bag mentioned in the preceding paragraph is $6.00.

26. During the initial telephone conversation, the American Future Systems representative indicates to the student being solicited that the Florida holiday is a vacation in Florida for four days and three nights and does not include meals and transportation.

27. No other terms and conditions relating to the Florida holiday are mentioned during the initial phone contact.

28. Before the scheduled show, a student agreeing to host such a demonstration receives a packet of information containing a number of invitations for guests and a description of what is involved at the show.

29. A sales demonstration put on by American Future Systems generally proceeds in two parts: A demonstration of the American Prestige Series products including a comparison of those products with other merchandise and an explanation of why American Prestige products are superior, and a sales portion where interested students are given an opportunity to purchase products on an installment plan basis.

30. Each student attending the show receives a jade necklace which has a value of $12-1/2.

31. At the times relevant to this proceeding, it was American Future Systems' policy to attempt to have 10 to 15 persons in attendance at a sales demonstration. That number does not include men, college freshmen, or non-college students.

32. American Future Systems' policy prohibited the drawing of a winner of the Florida holiday or the awarding of the tote bag to a hostess if 10 eligible person did not attend the show although the latter aspect of that policy is often violated by individual sales representatives.

33. The price of a "package" of merchandise sold to a student by American Future Systems ranges from $450.00 to $600.00.

34. If 10 eligible persons do not attend a sales demonstration, American Future Systems' representatives are under instructions to inquire of a student hostess whether they can go door to door accompanied by the hostess in a residence hall in order to secure the required number of persons for attendance at a show.

35. Sales representatives of American Future Systems generally do not reveal at sales demonstrations that the "Florida holiday" which will be given away may not be used unless the winner is 21 years of age, that the certificate which will be issued expires at a particular time which is often well before a winner reaches the age of 21, that there is an extra charge for the lodging if the vacation is used between December 18 and April 2 of any year, and that a person using the vacation is required to attend a meeting of an organization known as the "VIP Vacation Club" upon arrival in Florida or her certificate will not be validated.

36. American Future Systems pays $2.00 for each Florida holiday vacation certificate issued as a result of one of its drawings.

37. If the student decides to purchase American Prestige Series merchandise at the end of a sales demonstration, she is required to sign a sales contract at that time.

38. American Future Systems does comply with legal provisions requiring it to permit a student signing a contract for the sale of merchandise in the residence hall to rescind the contract within three days of the date of its signing.

39. An American Future Systems' contract contains a "code" at the bottom which consists of a number of letters. Those letters and the explanation given to them by American Future Systems' representatives are as follows:

Letters	Explanation
DPTI	Deposit Turned In
K	Deposit kept by sales representative
G	General student
M	Minority (Black) student
C	Married Couple
S	Student of Spanish descent
O	Student of Oriental descent
X	Student of Mexican descent
R	Regular 4-year college
J	Junior College
N	Nursing School
V	Vocational School

40. Sales representatives of American Future Systems are instructed by the company to check those portions of the code which are applicable to any particular purchaser.

41. At the top of an American Future Systems contract there is a space for indicating whether merchandise will be delivered immediately to the purchaser or whether delivery will be deferred until after graduation or until some other time.

42. If the sale of merchandise is made to a minority student who is a sophomore, junior, or senior, sales representative are encouraged to attempt to have that student request that delivery of his merchandise be by way of deferred delivery rather than by immediate shipment.

43. It is a policy of American Future Systems to require freshmen purchasers to make at least three consecutive installment payments before merchandise can be delivered.

44. No effort is made to encourage Caucasian sophomore, junior, or senior students to request delivery of their merchandise on a deferred basis.

45. In September of 1977, American Future Systems representatives conducted a number of sales demonstrations in the residence halls at Penn State.

46. Prior to that time, Edward M. Satell, the President of American Future Systems, had been advised by Penn State officials that commercial solicitation was prohibited on the campus.

47. In the fall of 1977, without determining whether that policy had been changed, Mr. Satell ordered his sales representatives to begin booking shows on the Penn State campus.

48. Although a number of such shows were conducted from beginning to end in the fall of 1977, some shows were interrupted by Penn State officials and American Future Systems representatives were requested to leave the residence halls because they were acting in violation of university policy.

49. Mr. Satell wrote two letters to Robert Patterson, a Penn State official, on September 14 and September 19, 1977 indicating that Mr. Satell believed that Penn State's

prohibition against commercial solicitation in the residence halls was unconstitutional.

50. In response, Mr. Satell received a letter from counsel for Penn State dated October 6, 1977 stating their view that Penn State's policy was legal and that further attempts at solicitation on the campus would result in legal action.

51. American Future Systems has not attempted to conduct any shows on the Penn State campus since October of 1977.

52. In the fall of 1977 Penn State officials did not know of American Future Systems' credit policy or its policy with respect to the "Florida holiday" drawings.

53. American Future Systems was prohibited from conducting sales demonstrations at Penn State because of Penn State's policy against such commercial activity occurring within the residence halls rather than because of any view held by Penn State officials as to the propriety or impropriety of American Future Systems' credit plans or its policy with respect to the "Florida holiday" drawing.

54. Mr. Satell was aware at least by September 15, 1977 that Penn State officials considered the holding of American Future Systems demonstrations to be in violation of university policy.

55. With that knowledge, Mr. Satell instructed his sales representatives, and particularly Karen Wintrey, to attempt to hold such shows on the Penn State campus. Mr. Satell did instruct his sales representatives to follow the instructions of Penn State officials if they requested the sales representatives to leave the campus.

56. Karen Wintrey was told by Mr. Satell that if she encountered problems at Penn State with respect to the

booking of sales demonstrations she should ignore the problems because American Future Systems had a legal right to put on such demonstrations.

57. Some of the persons who attended American Future Systems' sales demonstrations at Penn State believed that valuable consumer information relating to the quality of china, cookware, silverware, and crystal was imparted to them by the American Future Systems representative.

58. The purpose of such "consumer information" at American Future Systems sales demonstrations is to promote American Prestige Series merchandise and to encourage attendants of the shows to purchase such merchandise.

59. Patricia Peterson, a Penn State official, informed the sales representatives of American Future Systems in September of 1977 that American Future Systems would be permitted to conduct the educational portion of its show in Penn State residence halls if no attempt were made at the close of such shows to sell merchandise to students and was told that "there would be no point in that."

60. At least one Penn State student was forced to wait in the hall outside a study lounge on the evening prior to an examination because of the presence of an American Future Systems sales demonstration in that study lounge.

61. Mr. Satell stated that he would be willing to abide by some time, place and regulations if American Future Systems programs were permitted to be held on the Penn State campus but that he would continue to pursue certain policies of the company, including the minority credit policy, which he believed the company had a legal right to utilize.

62. The credit policies of American Future Systems are currently being litigated in a suit filed by the United States Department of Justice filed on May 8, 1978 in the Eastern District of Pennsylvania, Civil No. 78-1517.

63. Between 15 and 20% of the attendants at American Future Systems sales demonstrations purchase merchandise.

64. There is at least one student organization on the campus of Penn State which would request an American Future Systems sales representative to come on campus to conduct a sales demonstration if it were permitted to do so by the University.

65. American Future Systems agrees with a student that if there is a dispute with respect to any of the terms of the contract it will accept the results of arbitration before a Better Business Bureau.

66. American Future Systems permits purchasers of merchandise which has not been used to return that merchandise to American Future Systems and receive full credit for the amount paid to American Future Systems to be applied to the purchase of similar merchandise at a retail store of the student's choice so long as the return is made within two years of the date of purchase.

67. Under the installment sales contract entered into between American Future Systems and the student purchaser, no interest is paid during the remainder of that student year and interest thereafter until the student's graduation is at a rate less than that charged by most department stores or credit card companies.

III. Discussion.

The Plaintiff's complaint in this case raises essentially two issues which must be decided by the Court. First, the Court must consider whether Penn State acted properly in excluding sales representatives of American Future Systems from the University Park campus in September of 1977. Second, the Court must determine whether Penn State's continued exclusion of such representatives is consistent with the constitutional protection afforded to the sales activities of American Future Systems. Following consideration of the preliminary issues of standing and state action, the Court will consider those two questions *seriatim*.

The Defendants assert in their answer to the complaint that the Plaintiff lacks standing to bring this action. It is the view of the Court that the standing question in this case has two separate facets: Whether American Future Systems has standing to complain about the actions of Penn State and, if so, whether it has standing to raise the constitutional rights of persons not before the Court. With respect to the former question, it is clear that American Future Systems has suffered an injury in terms of sales lost as a result of Penn State's decision to exclude American Future Systems representative from the campus. Further, American Future Systems contends that as a disseminator of commercial information it has standing to assert its own First Amendment rights. The recognition of such standing is in keeping with the decision of the United States Supreme Court in Virginia State Board of Pharmacy vs. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976), where the Court indicated that Virginia's prohibition of price advertising by state pharmacists implicated the First Amendment rights both of potential recipients of that information and the pharmacists who were

attempting to communicate their prices. Therefore, the Court concludes that American Future Systems does have standing to raise First Amendment claims.

American Future Systems also asserts, however, that it has standing to raise the First Amendment rights of Penn State students who are desirous of receiving information about the products which American Future Systems sells. In support of that contention, American Future Systems cites the case of Craig vs. Boren, 429 U.S. 190 (1976), where the Supreme Court held that liquor vendors in Oklahoma had standing to raise the rights of Oklahoma males between the ages of 18 and 21 who, unlike Oklahoma females of a similar age, were prohibited from purchasing 3.2% beer. The resolution of the standing question in favor of the Plaintiff in that case, however, had a practical difference from this case because it permitted him to challenge the Oklahoma statutory scheme on equal protection grounds, a constitutional challenge not open to a liquor vendor suing on his own behalf only. Here, American Future Systems is permitted to raise First Amendment contentions based upon its own injury and it is the Court's view that to permit it to raise the First Amendment rights of college students would add little or nothing to the Court's analysis of whether Penn State's actions violated the First Amendment. Additionally, the original complaint in this action was devoid of allegations which would have permitted the Plaintiff to introduce proof at trial that the First Amendment rights of Penn State students had been violated or continued to be violated. The Court denied a request to amend the complaint which was made on the first day of the trial of this case because of the possible prejudice which would result to the Defendants from permission of the amendment. Therefore, because assertion of the First Amendment rights of Penn State students by American Future Systems

would add nothing to the analysis of this case and because facts in support of such a claim have not been pled nor proven, the Court will decline to permit American Future Systems to base its arguments on any asserted right of Penn State students to receive its communications.

American Future Systems asserts that it is entitled to raise the constitutional rights of other persons not before the Court as well under the "overbreadth" doctrine. American Future Systems has asserted that the regulations adopted by Penn State are invalid both facially and as applied to the conduct of American Future Systems and maintained the position throughout trial that evidence relating to particular facets of American Future Systems' presentation including its "Florida holiday" drawing and its credit policy, were not relevant because American Future Systems was not excluded from the campus because of those policies but rather on the basis of a general regulation prohibiting commercial activity on campus. The Court agrees with the Defendants, however, that the overbreadth doctrine should not be applied in the area of commercial speech and that applicable Supreme Court precedence prohibits the Court from permitting American Future Systems to raise the constitutional rights of other commercial vendors who are not before the Court. In Virginia State Board of Pharmacy vs. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771-72, n. 24 (1976), the Court noted its view that because advertising, the form of commercial speech involved in that case, is the *"sine qua non"* of commercial profits, there was little likelihood that commercial organizations would experience a chilling effect from advertising regulations which might be broader than constitutionally permissible. This viewpoint was reiterated in Bates vs. State Bar of Arizona, 433 U.S. 350, 381 (1977), and in that case the Court held that in the commercial speech context, the con-

duct of the particular party before the Court must be examined in order to determine whether it is properly subject to regulation regardless of the breadth of the statute or ordinance under which it falls. *See also* Ohralik vs. Ohio State Bar Association, 436 U.S. 447 (1978); Broadrick vs. Oklahoma, 413 U.S. 601 (1973). Consequently, the Court will not consider whether Penn State's regulation prohibiting commercial sales activity in its residence halls is too broad but will limit its discussion to two questions: whether Penn State properly could have requested American Future Systems representative to leave the campus in 1977 based upon the manner in which they conducted their activities at that time and whether the continued exclusion of American Future Systems representatives is constitutional based upon the manner in which they propose to conduct their business at this time.

Before turning to resolution of those two issues, the Court must determine whether the First Amendment is applicable to actions of Penn State University. Such a decision necessarily rests upon a resolution of the question of whether Penn State engages in "state action" which makes it susceptible to the dictates of the Fourteenth Amendment. The Plaintiff read into the record at trial certain stipulated facts relating to the state action issue, and this Court held in Benner vs. Oswald, 444 F.Supp. 545 (M.D. Pa. 1978) that the actions of Penn State were state actions. That decision was recently affirmed by the United States Court of Appeals for the Third Circuit. *See* Benner vs. Oswald, No. 78-1338 (3d Cir., January 24, 1979). Consequently, the Court concludes that the requisite state action is present in this case.

The Court now turns to the question of whether American Future Systems representatives could have been excluded from Penn State's campus in September of 1977

consistent with the dictates of the First Amendment. A decision on that question requires the Court to discuss the law applicable to the issue of the amount of First Amendment protection which must be given to commercial speech and to apply that law to the facts of this case. The leading "commercial speech" case and the one which overruled Valentine vs. Cherestensen, 316 U.S. 52 (1942), to the extent that it held that commercial speech did not deserve First Amendment protection, is Virginia State Board of Pharmacy vs. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976). In that case, the Supreme Court ruled that Virginia could not, consistent with the First Amendment, prohibit pharmacists from advertising the prices of prescription drugs. In so holding, the Court noted that a commercial firm enjoys First Amendment interests in communications of such information and that the dissemination of consumer information such as the price at which goods are sold serves a societal value in permitting consumers to make free, rational and informed decisions in the consumer marketplace. Further, the Court indicated that such information is often of more interest to the average citizen than "core" First Amendment communications relating to political issues. In that case, the Court concluded that Virginia was attempting to prevent any danger of misuse of commercial information by suppressing it altogether and stated that such a manner of regulation was not permissible, although commercial speech could be regulated through a valid time, place and manner restriction or by other means relating to its potential for deception, including requiring commercial advertisements to contain warnings, disclaimers, or other information needed to make them accurate. in Bates vs. State Bar of Arizona, 433 U.S. 350 (1977), the Court stated that newspaper advertisement by attorneys indicating the price of standard legal services enjoyed constitutional protec-

tion. In that case, a disciplinary rule adopted by the state bar, like the rule in *Virginia Pharmacy,* attempted to cure any possible deception inherent in price advertising by prohibiting the communication altogether. Such a rule, the Court stated, served "to inhibit the free flow of commercial information and to keep the public in ignorance." Bates vs. State Bar or Arizona, 433 U.S. 350, 365 (1977). Because the Court believed that any justification based upon the benefits of public ignorance was inconsistent with the rationale of the First Amendment, the blanket prohibition was again struck down. In In Re Primus, 436 U.S. 412 (1978), the Court upheld the right of an attorney associated with the American Civil Liberties Union to communicate to a potential litigant that a cause of action might exist, finding that such a communication partook of the characteristics of "core" First Amendment communication and was not "in person solicitation for monetary gain." The Court indicated that where core First Amendment communications were at issue, exacting scrutiny would be applied to state regulation and broad prohibitions of such communications were inherently suspect. However, in Ohralik vs. Ohio State Bar Association, 436 U.S. 447 (1978), the Court indicated that the type of inperson solicitation for monetary gain engaged in by attorneys which was absent in the *Primus* case could be regulated by a state bar association in a manner different from that by which other protected communications could be governed. The Court noted a number of factors relating to such in-person solicitations which are relevant to this case. First, it stated that commercial speech is not wholly undifferentiable from other forms of speech and indicated that commercial speech can be regulated in a manner not necessarily permissible in the field of non-commercial speech. Second, the Court stated that in-person solicitation of sales is "a business transaction in

which speech is an essential but subordinate component" and indicated that it differed even from the type of advertising present in the *Virginia Pharmacy* and *Bates* cases because it had the potential for exerting pressure on the recipient of the information, it demanded an immediate response from him, and it countervailed to some extent the purpose of advertising which permits free, rational, and informed consumer decision-making. Solicitation, because of the pressure on the person being solicited and the requirement that he react either negatively or positively to the service or goods being offered, does not promote reflective thinking on the content of the communication or encourage comparison of different services and prices so that it enjoys less protection than commercial advertising. Consequently, the state's interest in maintaining the professionalism of attorneys and in prohibiting the type of overreaching which was potentially present in in-person solicitation of clients by attorneys justified the state's prohibition of such contacts.

It is beyond dispute that American Future Systems has a right under the First Amendment to disseminate certain information with respect to the product which it sells. That information probably includes the type of product, how it compares with other products, and the price for which it sells. It is the view of the Court that in this case, however, American Future Systems asserts that it has a First Amendment right which goes beyond the right to disseminate such information to interested consumers. In effect, American Future Systems argues that it has a constitutional right to conduct sales demonstrations which require the presence of an American Future Systems representative, ten to fifteen interested consumers, and an hour-long exposition on the virtues of American Future Systems products followed by a short period of time during which sales to interested students are consummated.

The Court is not convinced that American Future Systems has a constitutionally protected right to sell its merchandise to college students in the manner which it has selected as being the most conducive to such sales. The programs put on by American Future Systems representatives on college campuses most closely resemble the conduct in Ohralik vs. Ohio State Bar Association, 436 U.S. 447 (1978) which the Court characterized as a business transaction in which speech is an essential but subordinate component. The Court is not of the view that Penn State's regulations prohibiting commercial solicitation in the residence halls on the University Park Campus can be fairly characterized as a restriction upon the First Amendment rights of American Future Systems. Essentially, Penn State has attempted to separate business transactions from the speech which accompanies them and has sought to regulate only the former. The evidence presented at trial shows that Penn State does not restrict the ability of commercial organization, including American Future Systems, to advertise in student newspapers or on student radio stations or to provide consumer information to students either through use of the telephone or the United States mails. Penn State has not attempted to prevent whatever evils might be present in the solicitation of sales by American Future Systems representatives by keeping the student body in ignorance of the information American Future Systems attempts to communicate to them. Rather, its policies prohibit American Future Systems representatives only from appearing on campus without an invitation in order to attempt to transact business or from appearing on campus with an invitation in an attempt to transact business with more than one student. In the view of the Court that Penn State's regulations do not place any burden upon American Future Systems' ability to disseminate information about its products to Penn State

students although those regulations do preclude American Future Systems from using its chosen method for such dissemination. So long as the information is reasonably available to students, a commercial vendor has no First Amendment right to disseminate it in the manner in which he chooses.

Assuming, however, that Penn State's residence hall regulations render it more difficult for students to obtain the type of information about commercial products which American Future Systems seeks to distribute, it does not follow that Penn State's regulations must fall. Two justifications support the exclusion of American Future Systems representatives from Penn State in 1977, either of which is sufficient to overcome any possible infringement upon American Future Systems' First Amendment rights. First, Penn State asserts that its residence hall policy is based upon a need for privacy of the students residing therein and the desire on the part of the institution to maintain a study-like atmosphere within the residence halls. Penn State produced evidence at the trial that American Future Systems demonstrations, lasting as long as an hour and a half, can be disruptive of the normal routine of residence halls and can preclude students from using common areas of the dormitories for purposes such as studying for which they were originally intended. Additionally, the Court recognizes that residence halls are in essence a student's "home away from home" and that the university may adopt such regulations as are reasonable to prohibit persons who are not university students or residents of dormitories from utilizing space therein. American Future Systems placed much emphasis on the fact that their representatives did not go on the Penn State campus or into the residence halls unless they were invited there by students. However, that contention is weakened when placed in context. The evidence demonstrated that

American Future Systems solicits invitations from individual students and that a representative will not go on campus merely to talk with one student even for the purpose of consummating a business transaction. Rather, once an invitation has been solicited, the American Future System representative induces the student hostess to invite a number of other students to attend an American Future Systems sales demonstration. Such a sales practice is inconsistent with the premise that American Future Systems speaks only to persons who have taken the initiative to invite them on campus.

Penn State demonstrated at the trial that in 1977 American Future Systems engaged in certain deceptive or potential coercive practices. The Supreme Court has recognized that the type of in-person solicitation of sales engaged in by American Future Systems differs from conventional protected speech because of the pressure exerted on the recipient of the sales talk, the fact that he must respond immediately to a request made to purchase merchandise, and the fact that persons in attendance at shows of American Future Systems do not have adequate time to reflect on the information which they have received and to make an intelligent, rational, and informed choice. *Cf.* Ohralik vs. Ohio State Bar Association, 436 U.S. 447 (1978). Therefore, the fact that American Future Systems engages in in-person solicitation makes that type of conduct peculiarly subject to regulation which attempts to avoid the dangers outlined above. Penn State's prohibition of group solicitation but permission of one student to invite a commercial vendor on campus for the purpose of conducting a business transaction with that student bears a reasonable relationship to the goal of avoiding the pressure tactics of in-person sales demonstrations. The fact that federal law requires that a student who purchases merchandise in the manner by which American Future

Systems sells its products be given a unilateral right or rescission for three days after the sale does not preclude Penn State from attempting to regulate further the conduct of in-person sales solicitations. Further, in 1977 American Future Systems engaged in what this Court views as deceptive practices relating both to its "Florida holiday" drawing and its credit practice. American Future Systems representatives did not disclose the manner in which American Future Systems extended credit to students and concealed at least some of the details relating to the Florida holiday from Penn State students. Therefore, even assuming that Penn State's regulation prohibiting commercial solicitation in the residence halls is overbroad, it was properly applied to American Future Systems in September of 1977. Penn State's interest in the privacy of its students and in preventing a company engaged in questionable commercial practices from soliciting on campus were sufficient to overcome any possible infringement upon American Future Systems' First Amendment rights occasioned by the prohibition of their sales demonstrations. If there is a common theme running through the Supreme Court's recent decisions relating to commercial speech, it is that deceptive and fraudulent commercial speech is clearly subject to reasonable regulation. *See* Young vs. American Mini Theatres, Inc., 417 U.S. 50 (1976); Virginia State Board of Pharmacy vs. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

American Future Systems has also asked the Court to enjoin Penn State from continuing to enforce its policy against commercial solicitation so as to preclude American Future Systems from holding sales demonstrations on the University Park campus. In support of this position, American Future Systems argues that it is willing to abide by any reasonable time, place and manner regulations im-

posed by Penn State in the future even though it may not have done so in the past. It is the view of the Court that an injunction should not be issued in this case for a number of reasons. First, as noted above, the Court is not convinced that Penn State's current policy has any effect on American Future Systems' ability to disseminate information which is entitled to First Amendment protection. Therefore, because the current policy with respect to American Future Systems is constitutional, there is no legal basis upon which this Court could enter an order enjoining the enforcement of that policy. Second, the Court is not convinced that American Future Systems is willing to abide by reasonable time, place and manner regulations. Mr. Satell's instructions to his sales representatives in September of 1977 to attempt to book shows although he was aware that Penn State considered the holding of such demonstrations to be a violation of its policy, taken together with this testimony concerning whether he would discontinue certain features of American Future Systems' credit policy with respect to minorities, convinces this Court that American Future Systems will abide only by those regulations which are constitutional in its view. Third, if American Future Systems is interested solely in communicating information about its products and prices to Penn State students, it was offered a means for doing so in September of 1977 when Patricia Peterson, a Penn State Official, informed American Future Systems sales representative that substantially the same sales demonstrations could be conducted on campus if American Future Systems representatives did not attempt to engage in the sale of merchandise at those shows. That offer was rejected by American Future Systems. Such a position makes it abundantly clear that Penn State's regulations, including its willingness to permit American Future Systems representatives to conduct shows on campus so

long as no commercial transactions are proposed at that time, do not infringe upon American Future Systems First Amendment rights. Although American Future Systems may have a first amendment right to communicate to students information relating to the virtues of its products and their price, it has no First Amendment right to sell merchandise at that time on campus. The regulation relating to sales imposed by Penn State is simply an "infringement on profits rather than on First Amendment rights." National Market Reports, Inc., vs. Brown, 447 F.Supp. 1301, 1304 (S.D.W. Va. 1978) (3-judge court). The Court does not construe Penn State's regulations to prohibit individual students from seeking out American Future Systems representatives at a time following the holding of a show in order to enter into business transactions so long as American Future Systems representatives do not attempt to sell their merchandise at the show to the persons in attendance. Finally, even if the Court were to conclude that Penn State's current policy does infringe upon American Future Systems' First Amendment rights, the interests of privacy and avoidance of the dangers of in-person solicitation served by that policy remain the same today as they did in 1977 and the Court reaches the same conclusion, namely that any such incidental infringement of the First Amendment rights is completely justified by those interests. Therefore, the request for an injunction will be denied.

The Court reaches the following

IV. **Conclusions of Law.**

1. American Future Systems, Inc. has standing to challenge Penn State's residence hall regulations only as they apply to the past and present conduct of American Systems, Inc.

2. Penn State engages in state action sufficient to subject it to the strictures of the Fourteenth Amendment.

3. American Future Systems, Inc. has the right pursuant to the First and Fourteenth Amendments to the United States Constitution to disseminate certain consumer information to students at Penn State, including descriptions of the products which it sells, comparisons of those products with similar merchandise, and the price at which its products can be purchased.

4. The regulations prohibiting commercial solicitation in the residence halls adopted by Penn State do not infringe on the First Amendment rights of American Future Systems, Inc.

5. Assuming that Penn State's residence hall regulations infringe upon the First Amendment rights of American Future Systems, Inc., the regulations as applied to American Future Systems in 1977 were justified either by Penn State's interest in preventing a commercial vendor from engaging in deceptive or coercive trade practices on the campus of Penn State or, alternatively, by the privacy interests of Penn State's students in their residence halls.

6. The continuing exclusion of American Future Systems representatives from the campus of Penn State does not infringe upon the First Amendment rights of American Future Systems.

7. Assuming that the continuing exclusion of American Future Systems representatives from the Penn State campus infringes upon the First Amendment rights of American Future Systems, that infringement is justified by Penn State's interest in preventing the dangers inherent in in-person solicitation or sales, or alternatively, by Penn State's interest in protecting the privacy of its students within the residence halls.

8. American Future Systems is not entitled to a declaratory judgment that Penn State's expulsion of American Future Systems representatives from the University Park campus in September of 1977 violated the United States Constitution.

9. American Future Systems is not entitled to an injunction prohibiting Penn State from enforcing its policy excluding commercial vendors from residence halls on the University Park campus against representatives of American Future Systems, Inc.

An appropriate order will be entered.

/s/ MUIR
MUIR, U.S. District Judge

DATED: February 2, 1979

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

AMERICAN FUTURE SYSTEMS, INC., et al.,	:	
Plaintiff	:	Civil No. 78-262
vs.	:	Complaint Filed 3/17/78
THE PENNSYLVANIA STATE UNIVERSITY, et al.,	:	(Judge Muir)
Defendants	:	

FILED
WILLIAMSPORT, PA.
FEB 2 1979
DONALD R. BERRY, Clerk
Per se
DEPUTY CLERK

ORDER

1. American Future Systems, Inc.'s request for a preliminary and permanent injunction prohibiting the Defendants from enforcing their policy of prohibiting commercial activity in the residence halls of the Pennsylvania State University is denied.

2. American Future Systems, Inc.'s request for a judgment declaring the policy of the Pennsylvania State University prohibiting commercial solicitation in the residence halls of the University Park campus to be in violation of the United States Constitution is denied.

/s/ MUIR
MUIR, U.S. District Judge

DATED: February, 2, 1979

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-1440

AMERICAN FUTURE SYSTEMS, INC., *Appellant*

v.

THE PENNSYLVANIA STATE UNIVERSITY and BOARD OF TRUSTEES OF THE PENNSYLVANIA STATE UNIVERSITY and JOHN W. OSWALD, Individually and as President of The Pennsylvania State University and M. LEE UPCRAFT, individually and as Director of Residential Life Programs of The Pennsylvania State University

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

(D. C Civil No. 78-0262)

Argued January 11, 1980

Before: SEITZ, *Chief Judge*, and VAN DUSEN and WEIS, *Circuit Judges*

(Opinion filed April 3, 1980)

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OPINION OF THE COURT

VAN DUSEN, *Circuit Judge*

Plaintiff, American Future Systems, Inc. (AFS), challenges on this appeal the Pennsylvania State University (Penn State) regulation forbidding sales demonstrations and solicitations in the university owned and operated residence halls. AFS asserts that the First and Fourteenth Amendments prohibit such a policy. After a trial to the court based on a complaint seeking a declaratory judgment that the regulation was unconstitutional and seeking an injunction restraining defendants from enforcing their policy against commercial solicitation on Penn State's campus, the district court held that this regulation does not violate the First Amendment. *American Future Systems, Inc. v. Pennsylvania State University*, 464 F.Supp. 1252 (M.D.Pa. 1979). After careful consideration of the contentions of plaintiff AFS, we affirm for reasons which differ in some respects from those of the district court.

I.

At its University Park campus in State College, Pennsylvania, Penn State owns and operates 68 residence halls, housing approximately 13,000 students. A "No Trespassing" sign is posted at or near the entrance of each dormitory.[1] The floor plans of many of the dormitories are similar. A typical floor has 20 rooms, each occupied by two students. In addition, each floor also has a number of common facilities, such as lavatories, dressing mirrors, a laundry room, a storage room, and a study room. Before students become residents of the dormitories, they must sign a housing contract which states in part:

> "The conducting of any business enterprise for personal profit is prohibited in or around the university operated units."[2]

This statement is amplified by rules set forth in the student handbook:

> "The institution . . . has rights and responsibilities of its own. The rights and responsibilities of the institution include: . . . [the] [r]ight to prohibit individuals and groups who are not members of the University community from using its physical and operating facilities for commercial . . . activities." App. at V - 26a.
>
> "Lectures, concerts, demonstrations, displays, or exhibits may not be used in any manner as a means of promoting commercial companies, products, or services." App. at V - 27a.
>
> "The word 'commercial' . . . means any activity or event which results in personal financial gain to the peddler or organization thereof, provided that con-

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1. 464 F.Supp. at 1255, ¶ 13.
2. *Id.* at 1254, ¶ 6.

> tact between a peddler and a student shall not be deemed commercial if such contact was invited by the individual student involved." App. at V - 28a.
>
> "Persons who are not students or employees of the University, while on University property, are required to . . . abide by University policies and regulations." App. at V - 28a.

Pursuant to these guidelines, Penn State prohibits all commercial transactions in the dormitories with one exception: an individual student may invite a salesperson to his or her room in the residence hall for the purpose of transacting business with that student only.[3] Penn State's regulation of commercial activities on campus does not prevent businesses from placing advertisements in the student newspapers or on the student radio station. Nor does it preclude sales attempts made via the telephone or the mail.[4]

AFS, a corporation headquartered in Bryn Mawr, Pennsylvania, sells china, crystal, silverware, and cookware. AFS seeks to sell its wares at demonstrations attended by a hostess, invited guests, and a sales representative. To procure hostesses for these shows, AFS telephones college students at random, asking if they will host a show in their residence hall and promising each of them a gift of merchandise if they do act as hostess. The hostess then invites other students to the show. Each student is told that those who attend the show will be eligible to participate in the drawing of a winner of a four-day vacation in Florida.[5] AFS attempts to have 10 to

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3. *Id.* at 1255, ¶ 9.

4. *Id.* at ¶¶ 10, 18, 19. The telephone numbers of residents are listed in the lobbies of the dormitories, where they are available to members of the public. *Id.* at ¶¶ 11-12.

5. The "Florida holiday" is described in the initial telephone conversation as a vacation in Florida for four days and three nights, with meals and transportation not included. *Id.* at 1256, ¶ 26. No other terms are mentioned during that conversation. *Id.* at ¶ 27. At

15 students attend each demonstration. If less than 10 eligible[6] students are present, AFS sales representatives are under instructions to ask the hostess to accompany them door-to-door in the residence hall, seeking more guests for the show.[7] Once commenced, the AFS shows last approximately one hour. Most of the show consists of a demonstration of the products. At the conclusion of this portion of the show, the holiday drawing takes place. The students who are not interested in purchasing the AFS products are asked to leave. The students who remain are then asked to sign consumer finance contracts right away.[8]

AFS scheduled 51 sales demonstrations in Penn State residence halls for the last two weeks of September 1977.[9] Some of these were interrupted by university offi-

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the sales demonstrations themselves. AFS sales representatives generally do not reveal that the following restrictions on the vacation exist:

> [I]t may not be used unless the winner is 21 years of age. . . . the certificate which will be issued expires at a particular time which is often well before a winner reaches the age of 21. . . . there is an extra charge for the lodging if the vacation is used between December 18 and April 2 of any year, and . . . a person using the vacation is required to attend a meeting of an organization known as the 'VIP Vacation Club' upon arrival in Florida or her certificate will not be validated."

Id. at ¶ 35.

6. Male students, college freshmen, and non-college students are not "eligible." *Id.* at 1256, ¶ 31.

7. *Id.* at ¶ 34.

8. App. at I - 64-65.

The trial court made factual findings that AFS sales representatives indicate by code on the sales contract the race and national origin of the purchaser. Those purchasers who are minority students are encouraged to request delivery of the merchandise on a deferred basis, rather than immediately. Non-minority students are not encouraged to seek deferred delivery. Freshman students of all races are required to make three consecutive installment payments before delivery, however. 464 F.Supp. at 1257, ¶¶ 40-44.

9. App. at III - 59.

cials who informed AFS representatives that they were violating the established policy banning commercial activity. When AFS protested that it had a constitutional right to solicit sales within the residence halls, a Penn State official told AFS that it would be permitted to conduct the demonstration portion of its show if no attempts were made to sell merchandise to the students during the presentation.[10] AFS rejected that arrangement, stating that the sales portion was absolutely crucial.[11]

AFS ceased its activity at Penn State and filed suit in federal court, seeking declaratory and injunctive relief as described above. The case was tried to the court before an advisory jury. On February 2, 1979, judgment was entered in favor of Penn State. This appeal followed.

II.

AFS contends that it has a First Amendment right to carry on its demonstrations and sales in the residence halls at Penn State. It rests its assertion on *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), which struck down a state-wide ban on advertising the prices of prescription drugs. Penn State rejoins that *Virginia Pharmacy Board* does not guarantee to private business enterprises the right to use facilities of state educational institutions for their private business transactions.

The First Amendment provides:

> "Congress shall make no law . . . abridging the freedom of speech . . . ."

The Fourteenth Amendment secures this freedom against abridgment by a state. *Schneider v. State*, 308 U.S. 147, 160 (1939). Penn State, created by statute, funded to a significant extent by the state, and built in large part by the Pennsylvania General State Authority,

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10. 464 F.Supp. at 1258, ¶ 59.
11. *Id.*

Id. Not all publicly owned areas are appropriate settings for speech, debate, and assembly, however. The Supreme Court has explicitly stated:

> "The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated."

Adderly v. Florida, 385 U.S. 9, 47 (1966). In *Adderly* the petitioners had assembled on the grounds of the county jail to protest peacefully the racial segregation at the jail. This kind of activity has generally been protected by the First Amendment. *See, e. g., Edwards v. South Carolina*, 372 U.S. 229 (1963); *Cox v. Louisiana*, 379 U.S. 536, 559 (1965); *Brown v. Louisiana*, 383 U.S. 131 (1966). Nonetheless, the Court rejected the petitioners' argument that they had a constitutional right to stay on the property because they believed the area was particularly appropriate for the demonstration. 385 U.S. at 47. Despite the fact that this assembly was nondisruptive and the fact that the grounds were not marked with "No Trespassing" signs, the Court ruled that the First Amendment did not preclude the state from controlling the use of its property for its own purposes and prohibiting the petitioners from speaking and assembling there. *Id.* at 47-48.

More recently, the Supreme Court has emphasized that even when members of the public are freely permitted to visit a place owned or operated by the government, it does not necessarily become a "public forum" for purposes of the First Amendment. *Greer v. Spock*, 424 U.S. 828, 836 (1976). Rather, when the state restricts speech in some way, the court must look to the special interests of the government in regulating speech in the particular location. *Id.* at 837. The focus of the court's inquiry must be whether there is a basic incompatibility between the communication and the primary activity of an area. *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972).

Pennsylvania State University was established for educational purposes by statute in 1855. 24 P.S. §2351 *et seq*. Originally known as the Farmers' High School of Pennsylvania, it was specifically created to fulfill traditional educational goals by providing instruction in the humanities, social sciences, and natural sciences. 24 P.S. §2542. In 1862 it became a land grant college, teaching agricultural and mechanical arts, as well as other subjects. *Benner v. Oswald*, 592 F.2d at 177. From its beginnings to this day, it has maintained its identity as an institution dedicated to education. *Id*.

As discussed above, members of the general public do not have unrestricted access to Penn State residence halls. "No Trespassing" signs are posted near the entrances to all the residence halls. Although non-residents of the halls may enter the lobbies, they may not proceed freely to the private living areas.[12] We believe that these facts demonstrate that the arena at issue here, the residence halls at Penn State, does not constitute a "public forum" under the First Amendment.

We recognize that the absence of a "public forum" from this case does not end our inquiry, however. There are some "non-public forum" areas where the communication does not significantly impinge upon the primary business carried on there. *Greer*, 424 U.S. at 843 (Powell, J., concurring).[13] Penn State asserts that the

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12. 464 F.Supp. at 1255, ¶12.

13. Indeed, in *Tinker v. Des Moines School District*, 393 U.S. 503 (1969), the focus was on a school, and the Court struck down a policy which restricted the "political speech" of students. The Court held that the First Amendment prohibited the school officials from punishing students for the symbolic act of wearing black armbands to protest the hostilities in Vietnam. While solicitous of the free speech rights of students, the *Tinker* Court emphasized "the need for affirming the comprehensive authority of the States and of school officials . . . to prescribe and control conduct in the schools." *Id*. at 507. The Court placed great significance on the fact that the banned "speech" was silent and solitary, with no hint of group activity.

provides the element of state action necessary to trigger an inquiry into the First Amendment values which may be implicated by the Penn State policies regarding commercial transactions. *See Benner v. Oswald*, 592 F.2d 174, 180 (3d Cir. 1979).

Plaintiff AFS is correct that in *Virginia Pharmacy Board* the Supreme Court ruled that commercial speech is entitled to some level of protection by the First Amendment. 425 U.S. at 770. This holding, by itself, does not resolve the issue presented by this case, however. The statutory scheme discussed in *Virginia Pharmacy Board* effectively suppressed all dissemination of price information throughout the state. The case at hand presents a dramatically different fact situation, implicating many different concerns.

Penn State argues that it can restrict the use of its residence halls to purposes which further the educational function of the institution. It urges that transacting sales with groups of students in the dormitories does not further the educational goals of the university and, therefore, can be lawfully prohibited. It emphasizes that AFS seeks a ruling that its sales and demonstrations be permitted in the residence halls, areas which are not open to the general public. In light of all the facts of this case, we believe Penn State is correct.

The Supreme Court has held that there cannot be a blanket exclusion of First Amendment activity from city streets, sidewalks, and parks. *Hague v. CIO*, 307 U.S. 496, 515 (1939). As the Court explained:

> "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

AFS group sales do impinge significantly on the primary activities of a college dormitory. Penn State argues that its residence halls are "exclusively dedicated to providing a living environment which is conducive to activities associated with being a student and succeeding academically."[14] It contends that group sales activities within the residence halls would disrupt the proper study atmosphere and the privacy of the students.[15] It reiterates that there is no history of allowing group commercial transactions to take place in the dormitories. We conclude that Penn State has articulated legitimate interests which support its ban on group sales activity in the dormitories. We also conclude that these interests are

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NOTE 13 — *(Continued)*

"The school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners. There is here no evidence whatever of petitioners' interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students.

"Only a few of the 18,000 students in the school system wore the black armbands. Only five students were suspended for wearing them. There is no indication that the work of the schools or any class was disrupted."

Id. at 508.

Under the *Tinker* decision, students in the Penn State residence halls could not be forbidden to wear armbands in a silent political protest. It does not bolster plaintiff's claim before this court, however. The AFS sales activity is not silent, passive, or solitary. Rather, it is by definition group activity; it takes place in a hall where 40 students live in close quarters; and it has at least the potential to intrude upon the rights of other students. Further, the district court found that at least one student was forced to wait outside a study room on the evening prior to an examination while AFS conducted a sales demonstration in that room. 464 F.Supp. at 1258, ¶60.

14. Appellees' brief at 17.

15. 464 F.Supp. at 1255, ¶17.

furthered by the proscription against commercial transactions.[16]

III.

AFS attacks the prohibition against commercial activity on another ground. It notes that non-commercial group activities, such as political meetings, are permitted in the residence halls. It argues that, by extending First Amendment protection to commercial speech, *Virginia Pharmacy Board* forbids this distinction. In a case decided two years after *Virginia Pharmacy Board*, the Supreme Court explicitly rejected plaintiff's view that commercial and non-commercial speech must be treated exactly alike.

> "We have not discarded the 'common-sense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech. . . . To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the

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16. AFS argues that the First Amendment protects not only its right to carry on sales activities in the residence halls, but also the students' rights to take part in sales there. In *Virginia Pharmacy Board*, 425 U.S. at 757, the Supreme Court explicitly said that "[i]f there is a right to advertise, there is a reciprocal right to receive the advertising . . . ." Yet this statement does not resolve the dispute before us. The Court did not hold that because an individual may have a right to receive certain advertising information, that individual also has a right to participate in a commercial transaction wherever he or she pleases. The analysis contained in the text concerning the legitimacy of the restriction on AFS group sales in the residence halls applies as well to students who desire to purchase AFS products at group meetings. Also, we reiterate that the Penn State policy does allow an individual student to invite a sales representative into his or her room for the purpose of individually purchasing goods.

> Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression."

Ohralick v. Ohio State Bar Association, 436 U.S. 447, 455-56 (1978). In fact, the Supreme Court has upheld regulations which specifically distinguish between communications based on their commercial or non-commercial nature. *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974). Further, the Supreme Court has stated that in the area of commercial speech distinctions based on content may be permissible. *Young v. American Mini Theatres*, 427 U.S. 50, 70-71 (1976). In *Mini Theatres*, the Court narrowed its earlier statements which had indicated that regulation of communication based in any way on content was totally prohibited. The Court remarked that the threshhold question "whether speech is, or is not, protected by the First Amendment often depends on the content of the speech." *Id.* at 66. Moreover, "[e]ven within the area of protected speech, a difference in content may require a different governmental response." *Id.* The Court added that "[t]he measure of constitutional protection to be afforded commercial speech will surely be governed largely by the content of the communication." *Id.* at 68-69. In *Mini Theatres*, the Court concluded:

> "Even though the First Amendment protects communication in this area from total suppression, we hold that the State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures."

Id. at 70-71. Thus, theaters showing adult movies, which are protected by the First Amendment, can be treated differently — and more restrictively — from other movie theaters.

Such distinctions based on content are permissible under *Mini Theatres* because they do not violate the "government's paramount obligation of neutrality in its regulation of protected communication." *Id.* at 70. As the Court explained:

> "[T]he regulation of the places where sexually explicit films may be exhibited is unaffected by whatever social, political, or philosophical message a film may be intended to communicate; whether a motion picture ridicules or characterizes one point of view or another, the effect of the ordinances is exactly the same.
>
> "Moreover, even though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate. . . ."

Id. Although the subject matter of the speech in *Mini Theatres* differs from that of the commercial communication in the case at hand, both occupy a subordinate, though protected, position under the First Amendment. Thus, the *Mini Theatres* reasoning is instructive and applicable to this case.

In *Lehman* the Court directly faced a distinction based on the commercial nature of the communications. The Court sustained a policy which permitted commercial advertising on the public transit system but prohibited all political or public issue advertising. In doing so, the Court emphasized that "the nature of the forum and the conflicting interests involved have remained important in determining the degree of protection afforded by

the [First] Amendment to the speech in question." *Id.* at 302-03. It stated that a policy which treats commercial speech differently from non-commercial speech would be sustained so long as it was not "arbitrary, capricious, or invidious." *Id.* at 303.

Here Penn State has not totally suppressed the speech of plaintiff. It has restricted that speech somewhat, however. Although AFS sales representatives are allowed into the residence halls to present demonstrations to groups of students, they cannot consummate sales at these gatherings. Even that restriction is removed if the sales representative is invited to the hall by an individual student who decides to purchase the merchandise marketed by AFS.[17]

As noted above, Penn State has advanced reasonable objectives to support its ban on group commercial activity in the residence halls. Further, it has emphasized that traditionally there has been an absence of such activity in the halls. This places commercial speech in a quite different category from activities historically associated with college life, such as political meetings or football rallies. We cannot say that the record in this case reveals any arbitrary, capricious, or invidious distinction between commercial and non-commercial speech. We therefore conclude that AFS is incorrect in its assertion that the Penn State policy violates the First Amendment because it treats non-commercial speech differently from commercial speech.

Finally, plaintiff asserts that *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85 (1977), requires that Penn State's regulation must fall. In *Linmark* the Court held that an ordinance prohibiting the posting of real estate "For Sale" or "Sold" signs on all but model homes

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17. Of course, alternate methods of advertising its wares and transacting sales are still available to AFS. See text accompanying n. 4, *supra*.

violated the First Amendment. The ordinance had been passed in an effort to stem the flight of white homeowners from a racially integrated community.

Linmark is distinguishable from the instant case for a fundamental reason. There the Court stressed that the ordinance was not enacted "in order to promote any . . . value 'unrelated to the suppression of free expression.'" *Id.* Rather, it was enacted because the town feared the primary effect of the communication — "that [it would] cause those receiving the information to act upon it." *Id.* at 94. The town wished to suppress the information that homes were for sale. On the other hand, according to *Linmark*, regulations adopted because the place or manner of speech produces detrimental secondary effects on society may survive constitutional scrutiny. *See Mini Theatres*, 427 U.S. at 71 n. 34.

It is undisputed that, in support of its regulation, Penn State has advanced an argument based on a secondary effects theory. Penn State has not sought to suppress the communication that AFS, or any other commercial enterprise, has goods for sale. Instead Penn State has sought to exclude group sales from the residence halls in order to preserve better the traditional college environment and atmosphere conducive to effective education and learning.

Additionally, it cannot be said here, as it was in *Linmark*, that Penn State is attempting to achieve its goal by suppressing the free flow of truthful information. As mentioned earlier, not only is AFS free to sell its goods elsewhere than in the residence halls, it can even enter those halls, upon invitation, and set up group demonstrations of its products. All that it is restricted from doing is actually completing in those halls its desired commercial transactions.[18] Thus, we conclude that

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18. Although in *Linmark* the law restricted only one method of communication, the Court stated that this ordinance could not be sustained as a legitimate regulation of time, place, and manner of

Linmark does not require us to revise our conclusion that the Penn State regulation regarding commercial speech survives constitutional scrutiny.

Accordingly, for the foregoing reasons, we will affirm the judgment of the district court.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

NOTE 18 — *(Continued)*
speech because ample alternative channels of communication were not available. *Id.* at 93. The Court emphasized that the alternatives theoretically available were not methods through which realty is generally marketed. *Id.* This factor differs in the case before this court. There are available a number of alternatives which are generally used to market the kind of merchandise AFS sells. Cookware and china, for example, are often advertised in newspapers, through mailings, and on television, and are generally sold through stores, via catalog sales, or from demonstration booths. Thus, there are many more viable alternatives available for marketing these kinds of products than there are for selling one's dwelling.

AFS argues that it believes that group sales meetings are the most effective method of merchandising its goods. We do not believe that this is dispositive. *Linmark* does not stand for the proposition that the First Amendment requires that a seller in all instances be able to use the techniques he considers most effective. Rather, *Linmark* teaches that a realistic appraisal must be made of the alternative methods of communication generally used in marketing different products.